The Legal Writing Worksho

Better Writing, One Case at a Tim

Katie Guest Pryal, J.D., Ph.D

Jordynn Jack, Ph.D.

http://legalwritingworkshop.com

The Legal Writing Workshop

Better Writing, One Case at a Time

Katie Rose Guest Pryal, J.D., Ph.D.

Jordynn Jack, Ph.D.

Chapel Hill, North Carolina

First Edition

Contents

About the Authors

Katie Rose Guest Pryal, J.D., Ph.D.

Dr. Pryal has taught rhetoric, writing, and legal writing at the university level since 2004. She currently teaches legal reasoning and writing in the University of North Carolina School of Law and the UNC Department of English and Comparative Literature. She also serves as the University of North Carolina Pre-Law Advisor. After law school at UNC School of Law, she clerked for a federal judge before moving on to earn her doctorate with a specialty in legal rhetoric, argument, and writing. She is a member of the North Carolina State Bar.

Jordynn Jack, Ph.D.

Dr. Jack, Associate Professor of Rhetoric and Composition in the Department of English and Comparative Literature at the University of North Carolina, Chapel Hill, specializes in professional, technical, and scientific writing. She has taught at the university level since 2002. She joined the faculty at the University of North Carolina in 2005.

Preface

We wrote this book to offer writing instruction to legal professionals based on our expertise in rhetoric—a discipline founded over 2500 years ago to help people plead their cases in court. Ancient Greek and Roman rhetoricians developed theories of how best to persuade an audience, using principles of language, argument, and style to help speakers learn to argue effectively on any topic.

Today, the same ancient rhetorical principles can help you make the best possible arguments for your clients. Unlike other legal writing workshops, which focus primarily on revision and editing, we start at the beginning of the writing process to help you tackle any challenge. Our goal is to help lawyers develop a thorough system for writing and speaking, one that addresses a full spectrum of writing concerns, from beating writer's block with brainstorming strategies, to developing eloquent writing style, to arguing ethically for any given case.

As professors of rhetoric and composition, we understand that good writing does not require a system of hard and fast rules, but rather an ability to adapt your writing to the occasion at hand. We use a unique combination of ancient techniques and cutting edge research on rhetoric, writing, and composition to give you the tools to write effectively.

In **Chapter 1, Getting Started: Principles of Effective Writing**, we suggest that the first principles of effective writing lies in understanding 1) your **audience**—who will read your writing and ultimately judge its effectiveness and 2) the **situation**—time, place, and context. This means that every choice you make when you write should be based not simply on *correctness* but on appropriateness to the situation at hand. We guide you through a five point process to help you understand the rhetorical possibilities any situation and the kinds of considerations you should use to make appropriate writing choices. These considerations include: 1) how to maximize your credibility, 2) how to construct logically persuasive arguments, 3) how to ethically appeal to your audience's emotions and beliefs; 4) how to understand what the genre of writing affords, and 5) how to judge the timing and context for your

case.

In **Chapter 2, Finding Arguments: Invention**, we present a series of brainstorming activities to jumpstart writing, using strategies that the ancients called "invention." Participants in our workshops tell us that the hardest problem they face as writers is simply getting started. Invention activities help you to develop ideas for arguments using the evidence you have available and help you to identify further research needs. We will lead you through ancient techniques, such as using commonplaces and heuristics, or questions, as well as more modern techniques such as free-writing, looping, clustering, and concept mapping. These techniques ensure that you will never have to stare at a blank screen again, waiting for "inspiration" to strike. Instead, you'll have a set of tools at your disposal to help you stop stalling and start writing.

In **Chapter 3, Organizing Information: Arrangement**, we present strategies for putting your arguments in order, a task many writers overlook. Many do not realize that the way you organize information in a document or presentation can give you a tremendous persuasive edge. We often use the first organization that occurs to us, without considering how to order information in the most effective way. We explain how organization (or what the ancients termed "arrangement") can help you to put the most important information where your audience will be sure to notice it. We discuss different types of organization, their relationships to your audience, genre, and purpose, and their strengths and weaknesses in different situations. We focus in particular on ways of organizing narratives (such as the Statement of Facts in an appellate brief) to make the greatest impact on your audience.

In **Chapter 4, Developing Eloquence: Style**, we outline our "ACE" approach to style, teaching you guidelines of **Appropriateness**, **Clarity**, and **Eloquence**. Then, using examples drawn from legal documents, we guide you through a five step process to help you revise and edit your own writing. Although lawyers are often criticized for their impenetrable writing style, this does not have to be the case. In fact, you can learn to express the most complex information and technical terms in ways that are easy to understand--even eloquent.

In **Chapter 5, Writing the Right Thing: Ethics**, we discuss the ethics of persuasive legal writing, ways to avoid misleading an

audience using rhetorical fallacies or ambiguous language, and tools to avoid biased language. The first rhetoricians were sometimes accused of being "guns for hire," willing to argue any side of a case, whether right or wrong. (Sound familiar?) But actually, the link between rhetoric and ethics has always been strong. One ancient rhetorician described the ideal rhetor as "the good man speaking well"—someone who upheld and furthered the highest moral values of his community and nation. We believe today's lawyers should hold themselves to the same standard.

The Legal Writing Workshop will guide you from the start of your writing project to the end. We believe that all lawyers can be good writers and that all good writers can be better.

Chapter 1:
Getting Started: Principles of Effective Writing

§ 1.1. Rhetoric and Law

§ 1.1.1. The Beginning

Rhetorical instruction began in Ancient Sicily in the 5th century BCE, as a result of a series of land disputes that began when the tyrant Thrasybulus was deposed. Men possessing claims on land needed to learn to represent themselves in court.

The first teacher of rhetoric was purportedly a man named Corax. One of his first students was a man named Tisias. Tisias agreed to pay Corax according to the following scheme. Upon finishing his training, if Tisias won his first court case, he would pay Corax a given sum of money. If Tisias lost his first case, there would be no fee for his training.

After he graduated, Tisias decided not to practice law at all, so Corax took him to court to recover his fee. Corax used the following argument to the judge: "Sir—I do not care how you decide this case. If you rule in my favor, I shall get my money by order of the court. If you rule in favor of Tisias he shall have won his first case, and again I shall get my money."

In turn, Tisias argued: "Your honor, I do not care how you decide this case, for if you decide in my favor I shall not have to pay by order of the court. If you decide in favor of Corax, I shall have lost my first case, and by the terms of the contract I shall not have to pay."

Based on the principles of rhetoric, both Corax and Tisias were able to anticipate all of the possible outcomes of this litigation and make effective arguments.

§ 1.1.2. The Sophists

With the rise of democracy in Athens, public speaking became an important skill, since citizens needed to use oral arguments to engage in political and public life. Yet many viewed the first teachers of rhetoric, often called the Sophists, with suspicion.

First, the Sophists were willing to teach anyone to present effective arguments—anyone who could pay, that is. This challenged the usual educational system, which limited education to men of the aristocratic classes.

Rhetoric teachers also aroused suspicion because of their seemingly magical abilities to twist and turn words and arguments and to create emotional effects through language. Plato famously ridiculed the Sophists for believing that truth is always contingent upon the situation—that truth is always relative. He mocked them for arguing that rhetoric offers a path to understanding that contingent truth.

Following Plato's lead, many continue to be suspicious of rhetoric. Today, many see rhetoric as a tool for misleading others. Yet, we would argue, following the original Sophists, the only way we can know the truth is by negotiating with others through language.

This is the basic principle underlying our adversarial legal system. By arguing opposing sides of a case, we can get closer to finding what is true. In many situations—and law is one of them—we rely primarily on words to establish truth and determine a course of action. Thus, we had better prepare ourselves to use our words as effectively as we can.

Ancient teachers of rhetoric trained their students to adapt to any situation on the fly. Each situation for speaking and writing is unique, with different considerations and constraints. For this reason, the art of rhetoric never proscribes hard and fast rules; instead, rhetoric provides general precepts and tools for inventing arguments, called "heuristics."

In this chapter, we outline three of these heuristic tools:

1. The rhetorical situation
2. The rhetorical proofs
3. The common legal topics

Lastly, we will return to the accusations launched against the Sophists to consider the ethics of legal persuasion.

§ 1.2.The Rhetorical Situation

The first heuristic to consider is the rhetorical situation. Whenever you sit down to write something or prepare for a presentation or speech, you should jot down a few notes about these considerations:

- Audience
- Exigence
- Constraints
- Resources
- Kairos

§ 1.2.1. Audience

A legal writer's first concern is audience. On the face of it, this may seem like an obvious point. Yet it is surprising how often writers fail to truly consider their audience's needs, desires, and interests. In legal writing situations, writers are often drawn to the law first—the legal statutes and cases that apply to a given case.

Some legal writing texts often focus on the document itself—the memo or brief—and ignore audience entirely. For instance, one popular legal writing textbook starts off a chapter on drafting memos with sections like "Understanding What You Have Found," "Drafting the Heading," "Drafting the Statement of Facts," and so on. The audience receives little attention at all.[1]

Yet all types of legal documents are addressed to audiences, who will judge the appropriateness and effectiveness of arguments. In any rhetorical situation, you should always consider who will be reading or listening. What are their attitudes to the case? What are their concerns? What information do they already have, and what information do you need to provide for them?

Here is an example. In the case of an inter-office memorandum, the

---

[1] LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING xvi (Aspen, 4th ed. 2006).

audience may be a senior attorney who wants you to determine applicable statutes for a case. You will of course need to research these statutes, but when you are ready to draft your memo you will also need to consider your audience. Like any busy professional, your reader will want to expend the least amount of effort possible to find the information he or she needs in your memo. Since the reader has already asked for this memo, she is already favorably disposed to the content. So in this example, efficiency is your primary concern.

In other situations, your audience may be disinterested, confused or even hostile to your argument or topic. For example, a jury may be bored after sitting through hours or even days of a trial, or they may be confused about what is at stake, or they may feel disgusted, angry, or annoyed at your client. Taking the audience's emotions, attitudes, and needs into account can help you make your case more persuasively, arrange facts effectively, and choose your words strategically. In this handbook, when we provide advice about inventing arguments, composing written and oral documents, revising, and so on, we always focus first on making effective choices for your audience.

§ 1.2.2. Exigence

The second concern of the rhetorical situation is exigence: the cause or force that compels you to speak or write. Sometimes the exigence is obvious, and need not be mentioned explicitly. For example, in the case of a memo, the exigence is your colleague's request for information. In the case of a closing argument, the structure of a trial itself provides the exigence for your speech.

Sometimes, however, the exigence may not be readily apparent to your audience. If you are writing a letter to a client, for instance, you may need to explain first what prompted you to write. In an opening argument for a trial, you may similarly need to explain the exigence for the trial—what is the issue at stake upon which the jury needs to decide?

Some exigencies seem more compelling than others. If you think your audience might not immediately recognize the significance of the issue, you may need to do some explaining. This is especially important if you are requesting some kind of action on the audience's part. People are more likely to comply with your request if they know the reason—or exigence—behind it.

Example

A. Please send your payment of $350 by September 7, 2008.

B. To ensure that we will represent you in court on September 25, 2010,
please send your payment of $350 by September 10, 2010.

In example A, the reader is given no exigence for submitting their payment in a timely fashion. In example B, the reader first reads the reason for your request, then the request itself.

For any rhetorical consideration, then, ask yourself whether the exigence is readily apparent to your audience. If not, consider what you can do to make the issue seem more urgent to them.

§ 1.2.3 Constraints and Resources

The third and fourth considerations for any rhetorical situation are constraints and resources.

Constraints include those things that may limit your argument in some way. These may include lack of appropriate information, an unsavory client, or the limitation of jury knowledge about the subject of litigation.

For example, in defending someone accused of theft, the defendant's lack of an alibi may be a significant constraint. However, constraints also include broader considerations. For example, if you were defending a known pedophile accused of producing child pornography, one of your major constraints would be the audience's pre-formed attitude about pedophilia—a constraint you will face even if the defendant's actions do not imply that he has actively produced pornographic materials.

Resources are those things you can draw upon to bolster your argument. These include not only tangible materials, such as evidence, statutes, and case law in your favor, but also the less tangible advantages you may have. For example, if you are

representing a client who is a prominent and well-respected member of the community, then his or her reputation is a resource upon which you can draw.

Thus, for any rhetorical situation, you can consider audience, exigence, and constraints to help you formulate a persuasive strategy. The persuasive strategy includes the nitty-gritty details of legal reasoning, but goes beyond that to include the broader context in which you are writing. It is helpful to jot down some notes about the rhetorical situation *before* you begin drafting a document, to remind you that good legal writing is not just about facts, codes, and statutes, but first and foremost about rhetoric—making the best possible argument for your case. You can use the worksheet below to assess the rhetorical situation for any case.

§ 1.2.4. Kairos

Perhaps the most important consideration in any rhetorical situation is **kairos**, a Greek term that is most often translated as "right timing" and "appropriateness." For lawyers, paying attention to kairos can help you to make more persuasive arguments. Some issues or arguments might be more **kairotic** than others, depending on what is going on in national and local current events.

For instance, you might find it easier to argue in favor of environmental restrictions nowadays, given the attention to rising pollution rates and global warming in recent years. To give another example, you might find it easier to prosecute a case involving a home break-in if there has been a rash of burglaries in the area over the last few months, because the audience—the community, the jury—will be eager to put an end to the crime spree.

Table 1.1. Rhetorical Situation Worksheet

Element	Sample Questions	
Audience	Who will be reading this/listening to this? What do they care about? What are their needs? What are their attitudes to this case?	
Exigence	What is the reason/cause behind my writing or speaking? Does my audience know the exigence already, or do I need to explain it to them? How can I make my exigence more compelling?	
Constraints	What factors are working against me here? How can I address these constraints?	
Resources	What factors are working in my favor? How can I exploit these factors to make	

Resources	What factors are working in my favor? How can I exploit these factors to make a more convincing argument?	
Kairos	Is this the right time to make this argument?	

§ 1.3. The Rhetorical Proofs

In ancient times, Aristotle outlined three fundamental rhetorical considerations that apply to any given case—including legal cases. You may have heard of these rhetorical strategies already: *ethos*, *logos*, and *pathos*. Ethos relates to the credibility of the speaker, logos to the logical appeal of the argument itself, and pathos to the emotions and beliefs of the audience. Let's talk about each of these strategies—called "proofs"—in a little more detail.

§ 1.3.1. Ethos

Aristotle suggested three fundamental ways to demonstrate ethos. First, he counseled rhetors to show practical wisdom and good judgment, or *phronesis*.

In legal writing situations, you can demonstrate phronesis by being thorough with your research, courteous to the court, and judicious in drawing conclusions.

Second, Aristotle advised rhetors to demonstrate virtue and goodness. Here ethics enter the picture. The best way to appear virtuous and good is to be a virtuous and good person. We will touch on this more in the following section, "The Ethics of Persuasion."

Finally, Aristotle recommended that rhetors demonstrate goodwill towards the audience. Part of showing goodwill has to do with your attitude to your readers or listeners.

In his 2005 book, *Blink*, Malcolm Gladwell mentions that any sign of contempt demonstrated by one party to another is the number one indicator that a romantic relationship will fail. We contend that the same holds true for any rhetorical relationships between a rhetor and the audience. Showing contempt—or any kind of negative feeling—for the audience is likely to distance them from you. Taking a more charitable attitude is likely to yield greater benefits.

Goodwill also means thinking of your audience's needs and putting them first. For instance, goodwill might mean taking the time to explain a difficult concept to a jury, or taking the time to spell out the implications of a statute in a legal memo. Doing the work for your audience makes things easier for them.

Notice that ethos, like any rhetorical strategy, is focused on the audience—even though it ostensibly deals with the persona speaker or writer. Successful rhetors know that audience always comes first.

§ 1.3.2. Pathos

Pathos provides rhetoric with much of its persuasive power—as well as its peril. An emotionally charged speech or document can sway an audience and move them to action. Appeals to emotions such as fear or disgust can be especially powerful in legal situations, when a case involves emotionally charged topics such as murder or rape. Appeals to emotions and beliefs are indispensible in the law. It is through appeals to justice, equality, and fairness that court cases are often won.

Although pathos is a powerful appeal, writers and speakers should carefully select emotional appeals to avoid misleading audiences or overemphasize strong emotions. Your goal as a speaker or writer should be to use emotional appeals judiciously, in keeping both with professional codes of ethics and with your own sense of fairness.

Yet, it is difficult to write without using pathos appeals in some way. Take for example this passage from the majority opinion for *District of Columbia v. Heller* (2008):

> The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," 478 F. 3d, at 400, would fail constitutional muster.[2]

Here, the court appeals to a commonly held value in American public discourse—the sanctity of the home and the individual rights

---

[2] District of Columbia v. Heller, 554 U.S. ____, 128 S. Ct. 2783, 2817-18 (2008).

to self-defense and property. This passage is persuasive because it evokes positive emotions and images related to those beliefs—a safe and cozy household, family life, and pride in one's nation and its heritage.

The ancients mentioned several strategies for cultivating emotions in an audience. Perhaps the most powerful one is *enargeia*, or vivid description. When a speaker or writer describes an event or scene in concrete, visual language, the audience can create a mental picture, one that often carries more emotional weight than a less vivid version of the same event.

For example, in his dissenting opinion on District of Columbia v. Heller, Justice Breyer writes:

> The majority ignores a more important question: Given the purposes for which the Framers enacted the Second Amendment, how should it be applied to modern-day circumstances that they could not have anticipated? Assume, for argument's sake, that the Framers did intend the Amendment to offer a degree of self-defense protection. Does that mean that the Framers also intended to guarantee a right to possess a loaded gun near swimming pools, parks, and playgrounds? That they would not have cared about the children who might pick up a loaded gun on their parents' bedside table? That they (who certainly showed concern for the risk of fire, see *supra*, at 5–7) would have lacked concern for the risk of accidental deaths or suicides that readily accessible loaded handguns in urban areas might bring?[3]

By mentioning specific locations—swimming pools, parks, playgrounds—Breyer evokes images of children playing and, potentially, being harmed by gunfire. Of course, Breyer could have mentioned other locations more often frequented by adults, such as restaurants, bars, and shopping malls, but these would not carry as much emotional weight. Here, he describes specific places in order to encourage his audience to envision children getting hurt—an image that calls forth feelings of fear, parental concern, and horror

---

3 *Id.* at 2870.

on the part of readers.

Using value-laden words can also appeal to an audience's emotions. Positive or honorific language tends to evoke feelings of pride, warmth, or kindness in an audience, while negative language, or pejoratives, tend to evoke feelings of disdain or disgust.

Consider the honorific language in this passage from the oral argument in *Heller*. Here, Alan Gura, attorney for the petitioner Heller, states the following about the Second Amendment:

> [T]he Framers certainly felt that a militia was very important to the preservation of liberty. The Framers had just fought a revolutionary war that relied heavily on militia forces, and so they wanted to honor that and remind us as to the purpose—one purpose, not the exclusive purpose, but a purpose—of preserving the right.[4]

The language Gura uses, of "honor," "liberty," and "rights" seeks to evoke patriotism and pride in core national values—values audiences are likely to feel positively toward despite their stance on the actual issue at hand.

§ 1.3.3. Logos

Lawyers spend much of their training developing skills in logical reasoning, so the category of logos—or logical reasoning—may be quite familiar to you. After all, reasoning from statutes, legal precedent, and forensic evidence forms the bulk of most legal writing genres.

Aristotle distinguished between two types of logical proofs: extrinsic proofs and intrinsic proofs. Extrinsic logical proofs are those that we discover primarily through researching a case. In this category, we would put testimony (both expert and lay), precedent, and forensic evidence. Intrinsic proofs are those that require the rhetor to invent arguments using logical reasoning; in this section

---

4 Transcript of Oral Argument, District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.oyez.org/cases/2000-2009/2007/2007_07_290/argument.

we would put analogies, examples, and common topics.

Table 1.2. Types of Logical Proofs

Extrinsic Proofs	Intrinsic Proofs
Witnesses: Expert and Lay	Analogies
Precedent	Examples
Forensic evidence	Common topics

We will spend less time here on the extrinsic proofs because we believe they are already familiar to lawyers. However, we would point out that, as is the case with any legal argument, your goal should be to choose from among the extrinsic proofs to find those that are most compelling and persuasive to your particular audience. Thus, while a judge may place great stock in legal precedent, a jury might find precedent confusing and might be persuaded more by forensic evidence.

Intrinsic proofs are often overlooked in legal writing instruction because they seem to rely less on research and more on the speaker or writer's imagination. Yet, the value of intrinsic proofs is that they tend to be more readily understandable to an audience, especially in cases where the audience cannot take in a complex legal argument.

Intrinsic proofs are especially valuable in oral arguments. Audiences generally find it harder to follow a complex argument delivered orally than the same argument in written form. You can easily flip back through a printed document to review information or reread things that are confusing, but you cannot do the same thing with a speech.

Analogies

Analogies function as effective logical arguments because they can help audiences understand unfamiliar ideas by comparing them to more familiar ideas. For instance, consider the following analogy from the majority opinion of *District of Columbia v. Heller*:

> A broader point about the laws that Justice Breyer

> cites: All of them punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not with significant criminal penalties. They are akin to modern penalties for minor public-safety infractions like speeding or jaywalking. And although such public-safety laws may not contain exceptions for self-defense, it is inconceivable that the threat of a jaywalking ticket would deter someone from disregarding a "Do Not Walk" sign in order to flee an attacker, or that the Government would enforce those laws under such circumstances. Likewise, we do not think that a law imposing a 5-shilling fine and forfeiture of the gun would have prevented a person in the founding era from using a gun to protect himself or his family from violence, or that if he did so the law would be enforced against him. The District law, by contrast, far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first place.[5]

This analogy equates historical examples of fines or forfeitures for discharging a gun to contemporary treatment of infractions like speeding or jaywalking. Rhetorically, this analogy functions effectively because it helps to make something less familiar—the historical punishments for gun law violations—to something more familiar to the audience—the contemporary punishments for jaywalking and other minor crimes.

Examples

Examples perform a similar function to analogies: they help to make abstract ideas more concrete. For example, consider this passage from the dissenting opinion in *Kennedy v. Louisiana* (2008), which considered the constitutionality of applying the death penalty to cases of child rape. In his opinion, Justice Alito uses the following example to contradict the majority opinion's contention that murderers exhibit greater moral depravity than child rapists:

---

[5] District of Columbia v. Heller, 554 U.S. ____, 128 S. Ct. 2783, 2820-21 (2008).

> With respect to the question of moral depravity, is it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist? Consider the following two cases. In the first, a defendant robs a convenience store and watches as his accomplice shoots the store owner. The defendant acts recklessly, but was not the triggerman and did not intend the killing. [...] In the second case, a previously convicted child rapist kidnaps, repeatedly rapes, and tortures multiple child victims. Is it clear that the first defendant is more morally depraved than the second?[6]

These hypothetical examples help to concretize Alito's claim, namely, that some child rape crimes are more heinous and depraved than some murders.

The final source for logical arguments is the **common topics**, and since they are especially useful in legal arguments, we devote an entire section to them next. In the meantime, you can use the following chart to help you to brainstorm ways to use rhetorical proofs in your next writing task.

Table 1.3. Rhetorical Proofs Brainstorm

---

6 Kennedy v. Louisiana, 554 U.S. ___, 128 S.Ct. 2641, 2676 (2008).

Proof	Considerations	Notes
Ethos	How can I demonstrate prudence and practical wisdom? How can I demonstrate virtue and goodness? How can I demonstrate goodwill to the audience?	
Pathos	When can I use vivid description to evoke emotions? Can I use honorific or pejorative language? What emotional appeals are appropriate, and what's going too far?	
Logos	What extrinsic proofs can I use (witnesses, precedent, forensic evidence)? What intrinsic proofs can I develop? (Examples, analogies, legal topics?)	

§ 1.4. The Common Legal Topics

Aristotle advised rhetors to use topics, or *topoi* in Greek, for inventing arguments in a given situation. Topics are essentially categories of arguments, sometimes called "commonplaces."

Aristotle wrote that there are "common" topics that apply to almost any situation. For example, there is the topic of "possible or impossible." Using this topic, rhetors ask themselves: can I argue that my client's supposed crime was impossible given the circumstances? Can I argue that it was possible that another person committed the crime?

Aristotle also suggested that certain specialties have their own topics that certain fields—such as law—rely on to make arguments. We have identified **seven legal topics** that are most often used to make arguments in law, by lawyers in their briefs and by judges in their opinions. These are not the only types of arguments made in law, just the most common.

Next time you read an opinion or order from a judge, see if you can categorize all of the arguments the judge makes. Which are based on precedent? Which on legislative purpose? Which on public policy?

Table 1.4. Legal Topics Brainstorm

Legal Topic	Considerations	Notes
Precedent	Can I argue from legal precedent (either analogy or distinction)? Is it persuasive or binding?	
Legislation	How can I interpret relevant statutes? What is the purpose of legislature—whether stated or implied?	
Public Policy	What would best serve the community?	
History	Does the history of our country help decide this case?	
Comparative Law	Can I look to peer states (for state law) or nations (for federal law) for comparisons?	
Nature/Science	Can I cite statistics or scientific studies to support my argument?	
Ethics	Is the decision based on shared morals and values of the community?	

In the next chapter of the *Handbook*, on Invention, we go into detail with these topics, and discuss methods for using them in your own writing.

§ 1.5. Ethical Persuasion: Use and Abuse of Rhetoric

§ 1.5.1. Poor Public Relations

"Rhetoric" currently has a bit of a public relations problem. When the media uses the word, for example, most often it refers to double-talk or shady language, for example, language used by politicians to deceive the electorate.

Rhetoric's public relations problem is not new—it has existed since the Sophists, as we explain in Part 1, above. It should also be familiar to lawyers, because lawyers have a similar problem. Often, lawyers have a bad (and largely undeserved) reputation for being unethical. Lawyers are the butt of many jokes that suggest that lawyers are money-grubbing, deceptive, and unethical.

The following joke sums up these three qualities nicely:

> A client who felt his legal bill was too high asked his lawyer to itemize costs. The statement included this item: "Was walking down the street and saw you on the other side. Walked to the corner to cross at the light, crossed the street and walked quickly to catch up with you. Got close and saw it wasn't you. -$50.00."

In this joke, the lawyer (1) unethically (2) deceives the client, by (3) over-charging for work unperformed.

Here's a chart that compares the bad reputations of the Sophists in Ancient Greece and the bad reputations of today's lawyers.

Table 1.5. Comparison of Sophists and Lawyers

Accusation	Sophists	Lawyers
Money-grubbing	Taught rhetoric and wrote speeches for money, sometimes lots of money.	Represent clients for money, sometimes lots of money.
Deceptive	Taught rhetorical strategies that muddled the facts of a case—according to some	Use rhetorical strategies that muddle the facts of a case—according to some

Unethical	Didn't discriminate among their clients—taught anyone who could pay.	Don't discriminate among their clients—represent anyone who can pay.

You might suggest that this assessment of lawyers is incorrect, and you would be right for the most part. Just like the Sophists, and the word "rhetoric" itself, lawyers get a bad rap. After all, most lawyers don't make the millions we hear about on T.V. Most don't purposely try to muddle the facts of a case. And most do in fact discriminate among prospective clients, refusing to represent unsavory characters who do not deserve the assistance of lawyers.

In fact, there are many ways that lawyers work hard to ensure that law is practiced ethically. We teach professional responsibility in law schools and require the Multistate Professional Responsibility Exam for prospective lawyers. Many states have an ethics component in Continuing Legal Education requirements. Many have a character component of the bar exam. These are just a few of the ways that lawyers ensure the ethical practice of law.

§ 1.5.2. Zealous Advocacy

This discussion of ethical rhetoric and persuasion might seem to conflict with the lawyer's mandate to zealously advocate on behalf of a client.

Does zealous advocacy mean we should argue by any means necessary in order to win? Isn't this "by any means necessary" attitude part of the source of the bad reputation suffered by lawyers? Should we trample all over what is ethical simply to ensure victory for our clients—no matter how unsavory our clients might be?

These questions suggest that the notion of ethical rhetoric, or ethical persuasion, deserves closer examination.

Ancient teachers of rhetoric recognized that rhetoric was a powerful tool that needed to be treated with care. They asked, "How can we use this powerful tool—rhetoric—in an ethical way? Where is the line between persuading and misleading?"

Because we believe these questions are central to the use of rhetoric, Chapter 5 of this *Handbook* focuses solely on the ethical persuasion.

Chapter 2: Finding Arguments: Invention

§ 2.1. What is Invention?

Invention (Latin: *Inventio*) is the rhetorical term for the processes writers use to develop and refine arguments.

Roman rhetoricians divided rhetoric into five *Canons*, and Invention is the first of these. (The others are Arrangement, Style, Memory, and Delivery). We find that instructors often overlook invention when teaching lawyers how to write.

Sometimes legal writing instructors presume that they need only provide a framework for a document—Issue, Facts, Law, Application, Conclusion—and that students will simply fill in the framework. Other times, instructors presume that students will have a written draft in hand that merely needs revising and editing to make it perfect.

In our teaching, however, we have found that the hardest part of the writing process for most writers is the beginning. Writers often find themselves staring at a blank sheet of paper or computer screen, wondering where to begin, asking questions like, "How do I begin to tell the facts from my client's point of view?" or "How do I start presenting the law in the most persuasive manner possible?" or even "Where do I begin to research this topic?"

Invention skills can make the blank screen a thing of the past. We have developed five strategies that will get you started on any legal writing project. They can be sorted into two general types of activities.

The first type of invention activity involves using writing itself as a way to generate ideas. We recommend several tools that fall into this category, including Freewriting, Concept Mapping, and Question-Dialogue. These tools can be effective not only at the beginning of a writing project but also when you get stuck in the middle of a project.

The second type of activity involves brainstorming from a list of points or questions. In this category we include two classical frameworks for thinking about legal issues, the Common Legal Topics and the Stasis Questions.

After learning about all five strategies we provide here, we encourage you to modify or combine them to create invention

strategies that work best for you.

Five Ways to Jump Start Your Legal Writing	
1.	Freewriting
2.	Concept Mapping
3.	Question-Dialogue
4.	Common Legal Topics
5.	Stasis Questions

§ 2.2. Freewriting

Freewriting, in some ways, is the easiest thing in the world to do. It is also very difficult to get used to. In order to freewrite, **you simply sit down and start writing**. Sounds easy, doesn't it? The trick is, you can't allow yourself to worry about word choice, grammar, or where you are going with your ideas. Most of us have an internal editor that bogs us down when we try to write, and freeing ourselves of the internal editorial voice is hard for many writers to do.

The best way to free yourself from your internal editor is to refuse to read what you have written as you compose. Resist the temptation to even look at the words you have just written until you are finished freewriting.

If you can't resist rereading what you've written as you freewrite, there is a strategy that can help break this habit. When you sit down to freewrite at your computer, *turn off the monitor* before you begin. This is sometimes called **blind-writing** and can help you focus on the writing to come, instead of the writing that has passed.

§ 2.2.1. Focused Freewriting

Many techniques can make freewriting more useful to your project. For example, if there is a particular issue that has you stumped, you can freewrite on that particular idea only. You can pose a question to yourself, in casual language, and then answer it in a freewrite.

This is sometimes called **focused freewriting.**

For example, a criminal defense attorney preparing a closing statement for a client who is unsympathetic to the jury might start by freewriting with a specific question, like this: *What are the ways that my client is sympathetic?*

On the page beneath the question, the attorney would write as quickly as possible all of the ways that she could frame her client as sympathetic. Once all of the ideas are on paper, the attorney can work on arranging the ideas in a logical order and giving her sentences strong verbal style.

§ 2.2.2. Looping

Looping is a variation on freewriting that can help focus your writing even further. To employ looping, you begin with a regular freewrite. When you are finished, go back and read over what you have written, highlighting one or two statements that seem really important. Then, start a new freewriting session using just these statements. You can continue in this manner until you come up with good solution to your initial writing challenge.

§ 2.2.3. Put It to Work: Freewriting

1. When you get stuck in a writing project or need help getting started, open a blank document on your computer or pull out a blank sheet of paper.

2. Pose a question to yourself at the top of the page. Write the question, or prompt, in conversational language, as though you were asking the question to a colleague.

3. Get out a timing device, or just look at the clock. Give yourself a set period of time to answer the question—five minutes is a good length of time. During these five minutes, you are not allowed to stop writing or reread what you have written. You may only pause to reread the prompt question you wrote before the freewrite. If you get stuck, don't stop writing. Instead, write "I'm stuck" over and over until a new idea comes to you. This may seem silly to you at first, but the most important thing is to maintain the connection between your pen/keyboard and brain.

4. Have faith! Many, many people use freewriting because it

works. You might feel uncomfortable the first time you start writing, since you have no organized outline that you are following. Part of freewriting is turning off the critical editorial voice in your head that can tie up your creativity. So believe in the process and turn off that critical voice.

5. Don't worry about spelling, grammar, or organization. Start a new idea whenever it pops in your head. The most important thing is to trap all of your ideas on the page, so you can return to them later.
6. When your time is up, reread what you have written. Underline or highlight (or annotate, if using a computer) any of your writing that helps answer the question you posed to yourself.

Remember: Freewriting takes practice. Do not give up if your first attempt seems unproductive. Just try again for another five-minute period.

§ 2.3. Concept-Mapping

Concept-mapping is a technique of using pen and paper to connect ideas visually. Generally speaking, a concept map is **a diagram or sketch of a brainstorm**.

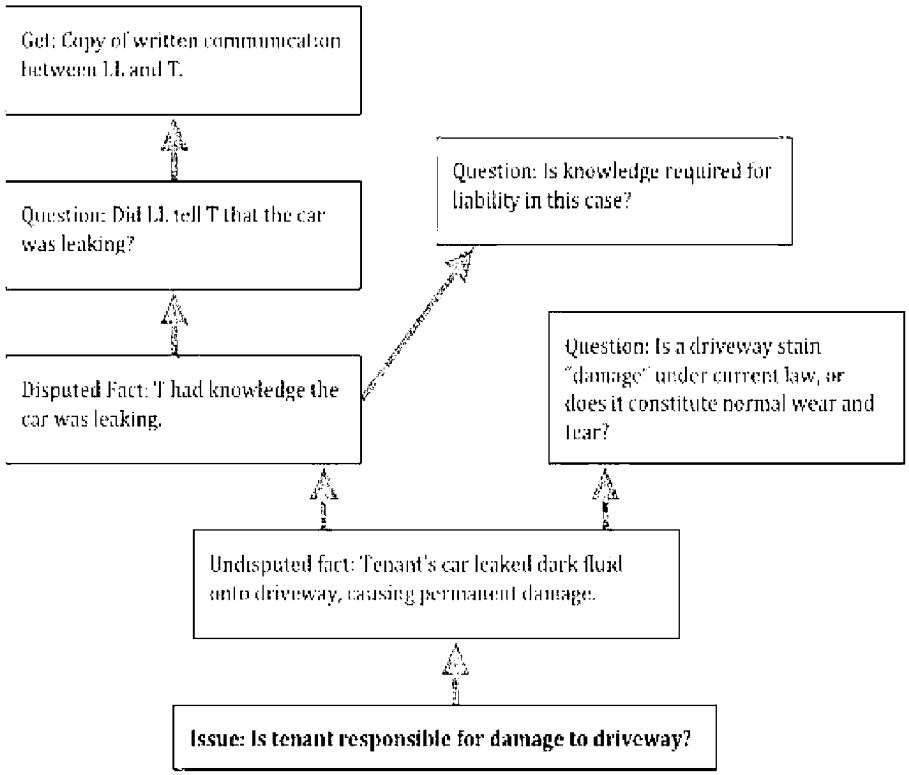
Concept-mapping is two-dimensional. Ordinarily, we use writing in a one-dimensional way: putting ideas end to end in a one-direction line. Concept-mapping allows you to branch out in many directions to find relationships between thoughts, questions, and ideas. If you are a visual thinker, you might prefer to sketch out your ideas using a concept map, instead of using Freewriting.

A concept map looks like circles or boxes connected by lines, and inside these shapes are sentences, phrases, or single words that represent an idea. The lines represent the relationships between these ideas.

You might find it helpful to include simple **headings** for each idea included in the map. You can even **color-code** the circles (or boxes) around the ideas to indicate the type of idea it represents. Suggested headings include *question*, *issue*, *undisputed fact*, *disputed fact*, and many others. I included these headings in my sample concept map, below.

Here's a sample concept map. The case it represents is a simple landlord-tenant dispute, in which the tenant (T) claims full refund of a deposit, and the landlord (LL) claims part of it for damages to the property.

Example: Concept-mapping



§ 2.3.1. Depth and Breadth

Keep both *depth* and *breadth* in mind while you map your ideas. *Breadth* asks how many initial ideas you can invent from the original issue. *Depth* asks how far you can take each of these initial ideas.

In the sample above, there is only **one** initial idea from the issue provided: the undisputed fact of the tenant's leaky car. For this reason, this concept map does not possess good breadth.

The left-hand branch of the chart, beginning with the undisputed fact of the tenant's knowledge of the leaky car, possesses good depth. It culminates with two tasks for the writer to complete: getting a copy of a letter the landlord wrote to the tenant and researching a point of law.

§ 2.3.2. Mapping Technology

Some software companies have caught on to the usefulness of concept mapping and have created software just for this process. Using this software is especially useful if more than one person is working on a project—the document can be emailed from user to user until the concept map is complete.

Thinkature, and other companies, provide free online digital mapping tools (see www.thinkature.com). These tools allow groups to map across the Internet. Microsoft Visio, part of Office, is a flow-chart creator which can be used for concept mapping.

The Insert-->Text Box feature of Microsoft Word can also be used to draw a concept map. This is the software we used to draw the sample maps in this book. Give it a try the next time you brainstorm arguments for a case.

§ 2.3.3. Put it to Work: Concept-Mapping

1. Figure out what medium upon which you will draw your map. A large piece of paper (16" x 20") works well and gives you more space to work. A whiteboard also works really well, if you have access to one. Computer software provides a third choice.

2. Start with one or more key topics or issues. Write these in the center of the page and draw separate circles around each idea. You might use some of the other invention strategies provided in this chapter to help you get started.

3. As you think of ideas that relate to the key topic(s), write them down and draw circles around them.

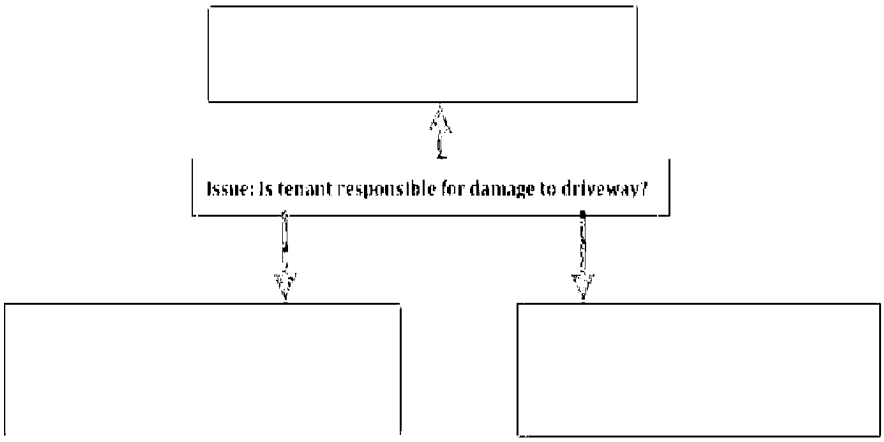
4. Draw lines between the circles to show relationships. Get creative, and go in all directions from the key topic.

5. Use colors and headings to indicate priority or other types of categorization.

6. Try not to worry about neatness or organization—those things come later, after you have developed your ideas.

Exercise 2.A

Practice concept-mapping in the space below. The starting issue is provided (the same as the sample, above), with arrows and spaces to help you begin your process. Try to think of any other issues that might need exploration. Pose any questions that need answering.



§ 2.4. Question-Dialogue

Question-Dialogue is a process by which you **interview yourself** in order to generate possible answers to questions.

Begin by generating a list of questions about a case. You might find it useful to freewrite this list of questions. Don't edit these questions during the invention process—you can do that later when you answer the questions.

Writing theorists suggest that Question-Dialogue is effective because merely asking questions frees writers to think about ideas without having to possess all of the answers.

You can write the questions down on one half of a piece of paper, and leave space to the right to answer them. Or, you can type the questions on a computer, and go back later and type in the answers. Sometimes it is useful to use a different color when you respond to the questions, or use a different font on the computer.

An important part of the Question-Dialogue process is **time**.

After you write the list of questions, it is best to **allow some time to elapse** before you return to the list to answer them. Some people might argue that this time allows your subconscious to generate answers to the questions while your conscious mind works on something else. We're not psychologists, but we *do* know from practice that the more time you can give yourself between generating questions and answering the questions, the better your answers will be.

Caveat: Don't let so much time pass that you forget the substance of the case!

A sample question-dialogue is provided below. The question-dialogue process is a great way to tackle all sorts of issues that arise in a case, from audience considerations to questions of statutory interpretation.

Sometimes just asking questions can help you figure out how to argue your case, because you are anticipating questions that the opposing counsel, jury, or judge might pose.

§ 2.4.1. Put it to Work: Question-Dialogue

1. Open up a blank word processor document or pull out a blank sheet of paper.
2. After reviewing the materials for your case, start writing a list of questions that you have about the case. This is not the time to research answers; just write the questions. Sometimes questions lead to other questions. Write them all down.
3. Set aside your list of questions for a while—an hour, a day—and then return to them. Don't try to answer them right away.
4. Go back through and respond to the questions as though they were posed by a colleague. If you don't know the answer, write, "I don't know," and then write ideas for how to answer the question.
5. When you are finished, you will have a list of (1) answers to questions about your case, and (2) a to-do list of answers you need to find.

Exercise 2.B

(1) Read the following fact pattern.

(2) In the space following, write a list of questions you may or may not be able to answer about this case. We've provided a few to help get you started.

(3) When you are finished, go back through and either answer each question or assign a specific task that would lead to the answer.

Mr. Miyagi is a physical therapist at Duke Hospital here in Durham and an amateur birdwatcher. Late last spring, Mr. Miyagi decided to spend a Sunday afternoon doing some hiking and fishing on some land in Washington County. Dorothy "Dot" Watson owns the land, known popularly as the Watson Farm. Ms. Watson, who is eighty-six years old, has made plans to bequeath the land to the North Carolina Farm Conservancy after her death.

The Watson Farm covers approximately 200 acres of mixed forest and meadowland. A stream crosses the northwest portion of the property, and there is a small lake situated in the southwest corner of the farm. Many varieties of songbirds can be found on the land, as well as deer, fox, and other animals. The farm has several walking trails, and two fishing docks are on opposite sides of the lake. Ms. Watson and her son run a small bait shop that is located on Farmstead Road, which forms the western border of the farm. They sell bait and other fishing gear, as well as drinks and snack foods.

The beauty of the farm makes it a popular spot for nature-lovers, fishermen, and photographers, and for several years now Ms. Watson has allowed people to hike, fish, and picnic on the farm. While hiking at the farm last spring, Mr. Miyagi took several photographs of the North Carolina state bird, hoping to enter the photos in a contest for amateur photographers. Mr. Miyagi circled by the shop to buy some bait and a couple of cold drinks and then headed to the lake to do some fishing. While walking down the dock on the west side of the lake, a board gave way and Mr. Miyagi's foot slipped through the broken board. His ankle was broken and the camera fell into the lake. When he retrieved the camera from the bottom of the lake beneath the dock, the film was ruined and the pictures that Mr. Miyagi had taken earlier were lost.

What claims might Mr. Miyagi have against Dot Watson?

Question	Answer
1. What statutes might apply in this case?	Is there a recreational use statute in this jurisdiction that might preclude liability?
2. What case law might apply?	
3.	
4.	
5.	

§ 2.5. Common Legal Topics

The legal topics are **conceptual places**, or themes, that judges, legal scholars, and lawyers use to create persuasive arguments.

Aristotle, in his work on rhetoric, developed the idea of **common topics**, or *topoi* in Greek (singular: *topos*). He suggested that certain fields might have a specialized list of topics.

We have identified seven topics that arise most often in legal argument. We will teach you how to use the common topics to brainstorm ideas for a case.

Whether you are preparing a document for a judge, or an argument for a jury, the legal topics can help you figure out what kind of arguments you want to make. Always keep your **audience** in mind: some topics work better for different audiences. You will find the topics particularly helpful in preparing motions and appellate briefs, as they can guide you through the different types of legal arguments that judges consider.

Below, we will introduce the **seven** common legal topics. For each topic, we will provide ideas to help you employ the topics in your writing.[7]

---

[7] Other legal scholars have approached the subject of the rhetorical topics. For example, J. M. Balkin has written a general study of "recurring forms of policy argument." J. M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (P. Brooks & P. Gewirtz, eds., Yale UP 1996). James Boyle used common topics—although he did not call them "topics"—when teaching Torts. He classifies the following five topics as types of policy arguments: (1) Arguments about judicial administration; (2) Arguments about institutional competence, (3) Moral arguments; (4) Deterrence or social utility arguments; (5) Economic arguments. James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003, 1056-1059.

Seven Common Legal Topics	
1.	Precedent and Case Law
2.	Legislation, Statutes, and Legislative Purpose
3.	Morality or Ethics
4.	Scientific Evidence
5.	Public Policy
6.	International Law
7.	History

§ 2.5.1. Precedent

Reasoning from precedent, or case law, is arguably the most fundamental method of legal argumentation.

Aristotle suggests in the *Rhetoric* that rhetoricians should use decisions from the past that deal with similar subject matter to support a proposed decision in the future.

Lawyers and judges use **analogy** to show how cases may be similar to the one at hand, and distinction to suggest that a case is different from the one at hand.

Although it's doubtful that a lawyer will forget to look into precedent when preparing for a case, we mention it here as one of the core topics.

§ 2.5.2. Legislation

The legislation topic arises in cases in which a statute is at issue. When a case turns on a statute, the side that wins is the side whose interpretation of that statute is most persuasive to the judge.

For example, in North Carolina, certain evidence is inadmissible at a rape prosecution. However there are exceptions to this barring of evidence. Here is an example:

> N.C. Gen. Stat. § 8C-1, Rule 412 (2009), Rape or sex offense cases; relevance of victim's past behavior.

> (b) Notwithstanding any other provision of law, the sexual behavior of the complainant is **irrelevant** to any issue in the prosecution **unless** such behavior:
>
> > (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented.

In order to argue how this statute should be interpreted, lawyers turn to case law which has already dealt with this particular statute. Even with the aid of case law, however, lawyers can argue about many different points of this statute: what does it mean to "closely resemble"? What does it mean to "reasonably" believe that the complainant consent?

You use the legislation topic when you argue that *your* interpretation of a statute (supported by case law) is the interpretation that the court should follow.

Put it to work: Write down all of the possible interpretations of a statute that affects your case. Try to justify each interpretation, even the ones you disagree with. Thinking about all of the different ways to interpret a statute can help make *your* interpretation stronger.

§ 2.5.3. Morality or Ethics

Reasoning from morality or ethics might appear to be self-explanatory—most people think they know what a moral or ethical argument looks like. However, in the context of our legal system, the morality topic grows more complex.

We live in a society that is not governed by or through religion—or isn't supposed to be. Sometimes, moral reasoning becomes mixed up with arguments arising from religious beliefs. The moral or ethical arguments employed by the courts are supposed to derive from a cultural system that is religiously plural.

This topic can be especially helpful in persuading a jury, who often reason from a moral belief system rather than from a legal framework that may or may not coincide with moral beliefs. Often, for a jury (and even a judge), an argument must be morally sound,

not just legally correct. It is your job to make your legal argument coincide with the ethical codes of your audiences.

Law has built in certain ethical stop-gaps, to help ensure that the "legal" coincides with the "ethical." For example, in contracts cases, a contract might be legally airtight, but if the terms of the contract "shock the conscience," a judge may void the contract.

Put it to work: Before you start writing a legal document, ask yourself: What are the possible ethical or moral beliefs that your audience will hold? How will these ethical beliefs affect their judgment in your client's case?

§ 2.5.4. Scientific Evidence

Reasoning from scientific evidence occurs whenever a court or lawyer turns to a scientific study, or any "research" conducted by a reliable extralegal authority, to make legal arguments. The science topic is fundamentally empirical: science gains its authority from physical proof, statistical evidence, and scientific research.

For example, in *Brown v. Board of Education*, the U.S. Supreme Court cites numerous psychological studies[8] to support its finding that segregation harms children of color: "To separate them [African-American students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[9]

Put it to work: Ask yourself, are there any scientific arguments that would support your client's claims?

Caveat: Reasoning from "Nature."

Today, legal professions turn to science and medicine to make arguments that in the past would have been founded in "nature." The "nature" or "natural law" topic has become outmoded as our society has grown more secular and scientifically-oriented, in part

---

8 Brown v. Board of Education 347 U.S. 483, 495 n.11 (1954).

9 *Id.* at 494.

because reasoning from nature often relies upon either a religious foundation or a culturally-specific claim about what is "natural." The *Stanford Encyclopedia of Philosophy* summarizes "natural law" this way: "[T]he paradigmatic natural law view holds that (1) the natural law is given by God; (2) it is naturally authoritative over all human beings; and (3) it is naturally knowable by all human beings."[10] The ties between the nature topic and religion are strong. The nature topic tends to be a **rhetorical fallacy**—an argument which, when you examine it closely, falls to pieces. Avoid the "natural law" topic.

§ 2.5.5. Public Policy

The catch-all phrase "public policy" brings community-based arguments into legal reasoning. When you ask about public policy, you are essentially asking this: **What will best serve my community or society?**

These words describe how policy functions in judicial reasoning: a court identifies "policy problems" that face the jurisdiction of the court, and searches for solutions to these problems through judicial review.

Lawyers make policy arguments all the time. For example, if a prosecutor argues that failing to punish a woman who kills her abusive husband will lead to more dead husbands—and not all of them abusive—he is making a policy argument.

Put it to work: Ask yourself, are there any policy questions that arise in your client's case? Are there any arguments you can make that affect society as a whole, or your community in particular?

§ 2.5.6. International Law & History

The history and international law topics, discussed together here, often function the same way in legal rhetoric. Both are reasoning by comparison: in the case of history, by comparison to our past; in the case of international law, by comparison to peer nations or states.

---

10 *The Natural Law Tradition in Ethics* § 1.4, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at http://plato.stanford.edu/entries/natural-law-ethics/.

In the *Rhetoric*, Aristotle suggests that rhetoricians use the topic of history in making arguments: "examples from history are more useful in deliberation; for generally, future events will be like those of the past."

In contemporary jurisprudence, the U.S. Supreme Court uses the history topic to give force to a finding that a right is "fundamental," and therefore deserving of special protection, because it is "deeply rooted" in our nation's history.

The international law topic is commonly used to suggest that new or greater constitutional protections should be provided to a group or activity based on the fact that our peer nations provide such protection.

Put it to work: Ask yourself, are there any laws in sister states or peer nations that should influence your case? Does our nation's or community's history provide any arguments for your case?

Table 2.1: Legal Topics Worksheet

Topic	Topic Questions	My Client's Case
Precedent	What case law affects the legal questions in my client's case?	
Legislation	What statutes affect my client's case? What are the possible interpretations of this statute? Which do I agree with? Disagree with? Why?	
Morality and Ethics	What are the possible ethical or moral beliefs that my audience will hold? How will these ethical beliefs affect their judgment in my client's case?	
Science	Are there any scientific arguments that would support my client's claims?	
Public Policy	Are there any policy questions that arise in my client's case? Are there any arguments that I can make to show how	

	these questions affect society as a whole, or our community in particular?	
International Law	Are there any laws in sister states or peer nations that should influence my client's case?	
History	Does our nation's or community's history provide any arguments for my client's case?	

§ 2.6. The Stasis Questions

In the 2nd century BCE, Hermagoras created stasis theory as a tool for developing ideas and arguments. In ancient rhetoric, *stasis* referred to the location of a dispute. Like much of classical rhetorical theory, stasis was developed for courtroom argumentation.[11]

Stasis theory gradually developed into four **modes of proceeding**, often framed as questions.

Stasis theory can be summarized by the four questions below. These questions can help you develop various arguments for your client's case by attacking the issues of the case from four different rhetorical **angles**.

The Four Points of Stasis Theory	
1.	Fact: Does a thing exist? Did an event happen?
2.	Definition: What kind of thing or event is it?
3.	Quality: Was it right or wrong?
4.	Policy: What do we do?

Have you ever found yourself in a situation where you were observing a dispute, and you wanted to step in? Not to argue one

---

[11] Hanns Hohmann outlines the complex relationships between stasis theory and contemporary legal rhetoric. Hohmann delves more deeply into stasis theory than we do here, enumerating another set of stasis questions specifically designed for law. Here, we limit our discussion to the "general" stasis questions because they are the most useful to the widest variety of legal writing, and because they are the easiest for contemporary writers to put into practice. Hanns Hohmann, *The Dynamics of Stasis: Classical Rhetorical Theory and Modern Legal Argumentation*, 36 Am. J. Juris. 171 (1989).

side against the other, but rather to help the parties figure out **what it is they're arguing about** in the first place?

Marriage counselors often serve this function: they help the spouses find the **location** of their dispute. Once the parties discover what it is they are actually arguing about—what the stakes are—it is much easier to find a solution.

This is stasis theory at work. Sometimes we all need to step back and figure out what it is we're arguing about—fact, definition, quality, or policy—before we can make sound arguments.

Example: Stasis and Abortion

An example of a stasis problem in law could be the **abortion debate**: one side argues the right to **life**; the other side argues the right to **choose**. "Life" is not the counterpart of "Choice." Rhetorically, these two groups are not arguing the same thing.

In terms of the stasis questions, "right to life" invokes **definition**: Abortion is defined as murder. "Right to choose" invokes **policy**: We should let women make these decisions for themselves.

It's interesting that "choice" advocates rarely debate the definition of abortion—they skip over the issue that abortion does, indeed, end a living organism. By the same token, the "right to life" advocates fail to address the policy ramifications of what they are advocating—that banning abortion will most likely create as many, if not more, problems than it solves.

Lack of stasis is the reason why the abortion debate won't be resolved any time soon.

Exercise 2.C

You are a lawyer defending a client accused of murder. Brainstorm possible defenses using the four stasis questions.

Suppose your client, the defendant and wife of the victim, claims she killed her husband because he was sexually abusing their children. She tells you that she planned the murder in advance. This premeditation renders the crime first degree murder under the applicable murder statute of your jurisdiction, and carries a possible sentence of the death penalty. As defense attorney, start framing the defense using the stasis points to generate the following questions.

1. Question of Fact

2. Question of Definition

3. Question of Quality

4. Question of Policy

Answer Set 2.C

There are many possible questions you could generate using the stasis questions. Here are some examples:

Question of Fact

Did the defendant commit the killing? (In this case, a lawyer might choose not to debate the question of fact at all—especially since the defendant admitted to the killing to the police.)

Question of Definition

What kind of crime is this?

Does it qualify as "murder" at all, or should the defendant be charged with manslaughter instead, or justifiable homicide?

Question of Quality

In what ways might the crime be mitigated?

Was she justified in killing?

Is this a heinous crime or a lesser crime and therefore deserving lesser punishment?

Question of Policy

How does this prosecution affect our society?

On the one hand, we do not want to endorse vigilante killings. On the other hand, should parents be allowed to protect the lives and safety of their children?

Once you have generated a list of questions using the stasis questions, the issues of your case should begin to coalesce.

Here, it becomes clear that a defense might turn on the issue of mitigation and perhaps one of policy. You, as defense attorney, will probably concede the question of fact, since the defendant admitted to the killing. The defendant planned the killing in advance, so she most likely cannot claim involuntary manslaughter (or "heat of passion" killing). Perhaps this jurisdiction has a special type of mitigation for women in abusive relationships.

2.6.1. Put It to Work

1. **Write down the main legal issues**: When using the stasis questions, we recommend that you summarize the main legal issues or questions of your case and write them down, one issue at the top of its own blank sheet of paper. You will apply the stasis questions to each legal issue of your case in turn. Separating the issues onto individual sheets of paper will help you keep your thinking clear.
2. **Apply the stasis points**: Tackle the first legal issue. Write down "Questions of Fact" below the statement of the issue and underline it. Under this heading, brainstorm all of the possible questions of fact that might arise under the legal issue. Write them out as questions. When you are finished, move on to the other three stasis points. Then, go through this process with all of the issues of your case. When you are finished with this process, you will have a page of material for each issue.
3. **Answer your questions**. Now, you can go through the questions you have posed and answer them. Prioritize them—meaning, pick your battles. Are there points that you can concede for the sake of your overall argument? Are there other points that need further research?

§ 2.7. Chapter Summary

In this chapter, you have learned five ways to jump-start your writing process.

Three to help you overcome writer's block

- Freewriting
- Concept Mapping
- Question-Dialogue

Two to help you generate sound arguments

- Common Legal Topics
- Stasis Theory

•

Chapter 3: Organizing Information: Arrangement

§ 3.1. What is Arrangement?

Arrangement is selecting and organizing facts, evidence, ideas, and arguments into an appropriate and effective order.

For ancient rhetoricians, inventing arguments represented only part of the rhetorical challenge. While the goal of invention is to find as many arguments as possible, the goal of arrangement is to choose which arguments to use and in which order to present them.

As writers, it can be easy to ignore this step. We have worked so hard to find arguments that it can be tempting to include all of them. Or, we are in such a hurry to get a document finished that we simply throw all of our arguments into it, in whatever order they occur to us. Yet by ignoring arrangement, we are ignoring a powerful persuasive tool.

Cicero once wrote: "When I am collecting arguments for my cases I make it my practice not so much to count [arguments] as to weigh them."[12] Learning to weigh the arguments for each case will help you to select the best arguments depending on your audience and the type of case you are facing. Then, you can order those arguments persuasively and signal your organization to the reader or listener.

In this chapter, you will learn the following:

1. How to **select the best arguments** and evidence for any document by taking audiences' **attitudes** into consideration.

2. How to adapt your arrangement to the **type of case** at hand.

3. How to **organize information** within a document for maximum persuasive effect.

4. How to **signal your arrangement** to your audience, using both verbal and visual cues.

---

12 MARCUS TULLIUS CICERO, DE ORATORE, Book II, Chap. 76, § 309.

§ 3.2. Selecting Arguments

For each argument or piece of information that you include in your document, be sure to consider first, how that argument will affect your audience, and second, how the argument will contribute to your overall claim.

We will consider each of these—**effects** and **contributions**—separately in the sections below.

§ 3.2.1. Effects on Audience

To determine how an argument will affect your audience, you should (1) assess your audience's **familiarity** with that argument or the background knowledge it assumes, (2) assess your audience's **attitudes** toward the case or the argument, and (3) assess your audience's **reading or listening habits**.

Familiarity

First, ask yourself: "How familiar is the audience with the case and with the relevant laws? What kinds of background information do I need to provide? Will I need to define key terms?"

It is especially important to consider familiarity when dealing with public audiences, such as a jury or a client, or even with other legal professionals who do not share your area of expertise. An audience can easily "tune out" if they do not understand the terms and concepts involved in a case. Thus, you should try to define new terms and concepts the first time they appear in a text, and to do so in terms the audience can understand.

You might also decide which arguments or information to include depending on the audience's familiarity—if it is not necessary to use a technical term, then leave it out. You'll find more information on dealing with complex information under ambiguous and obscure cases, below—see "Types of Cases."

Attitudes

Second, ask yourself: "What attitudes will the audience bring to the case? Will they be receptive to my argument, or hostile?"

For example, in cases dealing with difficult issues such as child abuse or rape, it may be hard for readers to maintain a neutral perspective—even if is their job to do so! You may need to consider appeals to *pathos* or *ethos* to help you portray the case or your client in a different light. Or, you may want to address your audience's concerns upfront and then focus their attention on the legal issues at stake.

You'll find more information on dealing with apathetic or resistant audiences under "difficult cases" and "mean cases" below—see "Types of Cases."

Reading or Listening Habits

Finally, ask yourself, "What are my audience's reading and listening habits? How eager are they to hear what I have to say?"

Busy professionals, lawyers and judges included, rarely read documents sequentially. Instead, they skip around a document looking for the most relevant information. This means that you must help your reader by making your important points most easy for them to find. Strong organizational clues, including subheadings, make documents easier to read.

Oral presentations pose particular challenges for lawyers and audiences. When listening to an oral speech, such as an oral argument, most people—even judges—find it difficult to keep focused for longer than 20 minutes or so. You can help to keep an audience focused by using verbal signposts to keep them on track. You'll find more information on how to signal your organization to your listener below.

Exercise 3.1

Consider the following types of documents, fill in the chart to indicate a) the usual audience; b) their familiarity with the topic; c) their attitudes; and d) their reading or listening habits.

Document	Audience	Familiarity	Attitudes	Reading & listening habits
Appellate Brief				
Opinion				
Client Letter				
Opening Statement at trial				
Internal memo				

§ 3.2.2. Contributions of Your Argument

The goal of a rhetorical approach to arrangement is to have a rationale for every piece of information you include in a document. Rather than going about arrangement haphazardly, consider the rhetorical effect of each choice you make.

When you choose an argument to include in a document, you should consider not only its effect on your audience, but also how it **contributes** to your overall claim.

You can use the following questions to help you select arguments for a case:

- Is it relevant?
- Does it contribute to my purpose or claim?
- Does it contribute either to pathos, ethos, or logos?
- Is it logical?
- Do I have evidence to support it?
- Will I need to address possible objections or refutations for this point?
- Will I need to provide additional background, definitions, or explanations for this point?

Put it to work

You can use arrangement strategies at any point in the writing process: before you have written anything, when you are deciding where to start, or even after you have written a rough draft or outline of your document.

One of the most common strategies writers use, though, is to employ arrangement considerations to help them **sort through their rough notes** for a case. Here is one way to do so:

- As you read over your notes for a case, use the questions from the checklist above to consider each point you might include.

- Cross out any point or argument that fails to address one of the points—i.e., is not relevant or logical.
- Rank the remaining arguments or points in order of importance or persuasive appeal.
- Circle any point or argument that will require more explanation on your part—i.e. background, definitions, or addressing objections or refutations.

§ 3.3. *Types of Cases*

Cicero listed five different kinds of *cases*, each of which required the rhetor to make different adjustments to the arrangement of a speech.

If you can predict at the outset what kind of case you are dealing with, you can make adjustments to your arrangement accordingly, by selecting arguments and framing them in a way that will address your audience's concerns.

The five types of cases are the following:

1. Honorable: a well-known topic or case, one that requires no introduction and is likely to already have support from the audience.

2. Difficult: a case in which the audience is unsympathetic or has been alienated from the issues raised.

3. Mean: a case in which the audience regards either the rhetor or the issue as trivial or insignificant.

4. Ambiguous: a case in which the audience is not sure about what is at stake, or in which the case is partly honorable and partly difficult.

5. Obscure: a case that the audience finds hard to understand, either because the case itself is complex, or because the audience lacks information or knowledge about the topic.

Notice that in each of these cases, your audience could be a judge, a jury, a co-worker, or a client, depending on the type of document you are composing.

Take the example of an appellate brief. Depending on which side you are on—appellant or appellee—the type of case changes.

- An **appellant** is asking an appeals court to **overturn** a lower court's decision. The appellant has a **difficult** case. Appeals courts are often loath to overturn lower courts' rulings, especially if the issues on appeal are within the trial courts' discretion.
- The **appellee**, on the other hand, simply asks the appeals court to **uphold** the lower court's decision. Thus, the appellee has an **honorable** case, one that is familiar to the higher court, and—depending on the standard of review—often bears the presumption of correctness.

In another example, a jury may find the legal intricacies of a murder case involving DNA evidence difficult to comprehend. Although the jury would agree that the case is important—that is, not a mean case—the scientific details would make the trial an obscure case, one that requires the lawyer to teach the jury about the science of DNA evidence.

Exercise 3.2

Consider a case you have written about or worked on recently. Answer the following questions:

1. What **category of case** does it best fall into?

2. How did the qualities of this category **change the writing task** you performed?

3. What **challenges** did this type of case create?

4. What kinds of **solutions** did you come up with as you wrote?

Exercise 3.3

For each of the following situations, indicate whether you think the case is honorable, difficult, mean, ambiguous, or obscure, and explain why.

Situation	Type of Case
ıg a memo to a ue who asked for on a case you are with.	
You are writing a letter to a client explaining why his appeal was not granted.	
You are a defense attorney writing an appellate brief on behalf of your client who was convicted of child abuse.	
You are representing a plaintiff in a workers compensation lawsuit, asking a jury	

for money damages for your client's injured ring finger.	
You are explaining to a jury how forensic evidence was gathered for a robbery case.	

§ 3.3.1. Honorable cases

If you are dealing with an honorable case, your task is simple. Your topic may need little by way of introduction, and you can assume that your audience will already be receptive to your arguments. So you can keep your opening remarks brief and move more directly to the body of arguments or facts you wish to present.

An example of an honorable case would be a situation in which your audience has requested information from you. Perhaps you have been asked by a senior partner to write a memo recommending a course of action on a case. Since your audience has prompted the correspondence, and is likely already somewhat familiar with the case, you can move pretty quickly into the nitty-gritty details. Indeed, internal correspondence such as this is likely to form part of a chain of correspondence in which each piece responds to a previous piece of writing (or a verbal conversation), so a direct approach is usually appropriate.

For this type of correspondence, the most important thing is to give the audience the information they need, and to provide that information directly and clearly. Even a receptive audience can grow weary or hostile if you are long-winded and fail to provide the relevant information quickly.

A busy colleague probably wants to find the relevant information and your recommendation quickly, so a direct approach works best. In business reports, writers usually include an "executive summary" to provide this information up front. Lawyers often use this same strategy in legal correspondence by providing a summary of Questions Presented and Brief Answers at the beginning of memos.

Another example of an honorable case would occur if you were representing the prosecution for a case involving child sexual abuse. You can bet that members of your audience—judge and jury—already hold strong beliefs about this type of crime. You could begin directly by describing the facts of the crime committed, for instance, seeking to appeal to pathos—the audience's emotions and beliefs. Note, however, that if you were representing the defendant in the same case, this would not be an honorable case for you, but a difficult one.

For Honorable Cases:

1. Use a direct approach
2. Don't waste the audience's time
3. Provide the most relevant information quickly and clearly

§ 3.3.2. Difficult cases

In a difficult case, you will need to do some work to help make the audience more receptive to your argument, because in a difficult the audience is unsympathetic to your position.

For example, say you are preparing for a sentencing hearing in a case in which you are defending a person who has murdered his father and might be sentenced to death. You hope to argue to the jury that the death penalty should not be applied due to mitigating evidence. Thus, you are arguing for mercy for someone whom your audience will likely find repellent. How can you move the audience—the jury in the sentencing hearing—toward a more receptive position for your client's case?

As you prepare your closing arguments, you might pay some attention to how you begin your narrative. Rather than starting directly with the crime, you might begin by telling the story of your client's upbringing—perhaps he was himself abused by his father, or suffered from neglect. These details would appeal to pathos, creating empathy for your client.

Or, you might start by telling the audience about your client before the crime occurred—was he attending college, or working a full-time job to support a family? Any of these details would help to strengthen your client's ethos.

Another tactic might be to begin with the criminal investigation or the trial itself. Were there significant breaches of justice? Here, you would shift the focus away from the crime itself and towards the audience's values of fairness, justice, and equality before the law. Or perhaps your client killed because he felt he suffered wrongdoing caused by the victim.

In other words, since your audience already knows that your client committed murder, your goal is to shift their attention away from

the issue of the crime towards issues of mitigation.

By thinking creatively about where to start, and then how to order the elements in your argument, you could try to make your audience more receptive. The same principle applies to any case where your audience may be hostile—when a more indirect approach may be needed.

For Difficult Cases:

1. Try an indirect approach

2. Strengthen your own ethos or that of your client

3. Show respect for the audience and their concerns

4 .Try admitting the unsavory nature of a case, while stressing the "real issue" at stake—one that diverts your audience's attention

5. If an audience is tired or likely to be bored, say that you will be brief, and keep your comments direct and to-the-point.

§ 3.3.3. Mean or Ambiguous Cases

In a mean or ambiguous case, your audience might lose interest because a) they do not understand what is at stake, or b) they regard the issue at stake as unimportant. In such cases, you will need to do some rhetorical work to make a case seem relevant to an audience.

A good example of this type of case was the Outlying Landing Field (OLF) case in the Eastern District of North Carolina.[13] The case began in 2004 when the Southern Environmental Law Center (SELC) sued the Navy for failing to complete an objective review of the need for a landing strip near the Pocosin Wildlife Refuge in southeastern North Carolina. The Navy argued that the landing field would provide essential training for Navy pilots, thereby contributing to national security—a timely argument in 2004. In

---

[13] Wash. County v. United States Dept. of the Navy, 357 F. Supp. 2d 861 (E.D.N.C. 2005).

contrast to the Navy's case, the SELC's argument turned on protection of migratory birds. How could the SELC make the issue of wildlife protection seem as important as national security?

In their motion for an injunction, the SELC focused not simply on environmental issues, but on the actual procedure the Navy used to select the proposed OLF site. The SELC painted the Navy as incompetent in their assessment of the environmental impact, arguing that the Navy failed to take a "hard look" at the environmental effects of its actions. The argued further that, while the Navy would not suffer harm if the injunction were issued, the citizens and environment of the counties involved *could* suffer irreparable harm if the Navy moved forward with their plans. In this way, the SELC showed the importance of the issue from a legal as well as ethical perspective.

For Mean or Ambiguous Cases:

1. Show the importance of the issue

2. Show how the issue affects the audience directly

3. Show how the issue affects the general welfare of the community, state, or nation

§ 3.3.4. Obscure Cases

In an obscure case, the audience does not understand the facts or laws at issue. While the audience might not necessarily regard the legal issues as trivial (as in a mean case), they are likely to lose interest simply because they cannot follow the arguments or do not understand the technicalities.

For example, let's say you are writing a letter to a client who has inquired about a possible workers compensation case. Perhaps she has been injured while working at a factory but has been denied compensation from her employer. After reviewing the case, you decide that her case is not actionable. You need compose a client letter explaining why you have made this decision.

Just to set the context, consider that this client likely has a high school education. When she tries to research information about

workers compensation on her own, she may come across confusing websites with strange legal terminology. Perhaps she has received confusing information from her employer, or from others. Your goal is to explain your decision clearly and anticipate questions she may have.

If you do not explain your decision to her clearly, you (or your office) will likely receive more communication from her—phone calls or e-mails asking for clarification—an outcome that would waste your time and money. This qualifies as an obscure case: the audience (your client) does not understand the issue clearly or the legal concepts behind it.

Clarity is the best solution for an obscure case. In this example, your should state your decision and a rationale for that decision very early on in the client letter, so that your client does not have to read through a page or two of text before she knows what the outcome will be. Next, you should explain the legal rationale for your decision as clearly as possible, using as few technical terms as possible, and then only when absolutely necessary.

There are other strategies that make obscure cases easier for your audiences to understand. For example, you should use **forecasting**. When you forecast, you first provide an outline of the points you are going to make, in brief, and then explain each one in turn.

A related strategy is **enumeration**. For instance, you could say something like this: "There are three reasons why we cannot proceed with your case. First.... Second.... Third...."

When presenting technical information, you should also focus on **style**. (See Chapter 4, particularly the sections on clarity, levels of formality, and levels of technicality.) In general, when you are writing highly technical information to a lay audience, you should try to balance the level of technicality by using simpler sentences, somewhat less formal writing, and attention to definitions and descriptions.

For Obscure Cases:

1. Foreground your claim or decision

2. Forecast your argument clearly; enumeration helps
3. Organize your document or speech carefully
4. Pay special attention to formality and level of technicality

§ 3.4. Persuasive Organization

While not all types of organization can be used any given genre or situation, there are some general principles or strategies that you may find useful in various genres of legal writing. You might consider these types of organizations when outlining the Argument in a motion or brief, or even when writing a client letter or internal memorandum.

As you review these strategies, you will notice that they complement each other and can be used in coordination to create the most persuasive organizational strategy for your particular document.

First and Last

In almost any type of composition you can think of—from a dance performance to a novel to a campaign speech—the audience will best remember what comes first, and what comes last.

This principle applies not just to compositions at the document level, but also within a composition, at the level of each section, paragraph, even sentence. By paying attention to how you start and end a document—or a part of a document—you can maximize its rhetorical effect.

Climactic Organization

For this type of organization, you move from the least important or interesting point to the most important or interesting, gradually building the audience's interest. This kind of organization can be useful if you want to get an audience riled up about a case where they need to make a decision.

For instance, it could be very useful in a closing argument, since a

jury will have your last point in mind before they go off to consider their decision.

Indirect Organization

With this type of organization, you hold off on your main claim or point for a little while. This tends to be useful for a resistant or bored audience. For example, you might need to use the first part of your text to create interest in the audience, or to address their misgivings or concerns. In difficult, obscure, or mean cases, an indirect approach can help you to get the audience on your side (or to at least get their attention).

Be careful not to carry on too long with these kinds of rhetorical excursions, since you also risk frustrating your audience if they are waiting for you to get to the point.

Bury the Weakest Link

In this arrangement strategy, you strategically order your reasons or evidence so that the weakest point is buried in the middle. So, you begin and end with the points you think are strongest and most likely to gain the audience's approval. You put the weakest points in the middle, where they are less likely to be noticed.

Of course, when you are selecting arguments to include in a text, you will probably exclude the very weak points, if possible. So weak and strong are relative terms here. This organizational strategy is a bit sneaky, so be sure to consider the ethical implications of this choice. If your organization misleads your reader, then you might violate a rule of professional responsibility. (For more on this subject, see Chapter 5 on Ethics.)

Logical Chains

Logical chains are arguments that build on one another. Each reason or piece of evidence follows from the first. A logical chain can be very effective because it carries the audience along from link to link. In some ways, this makes it more difficult for an audience to refute your argument, because once they have accepted one reason or piece of evidence, they will be more inclined to accept the next link in the chain as valid. In this way, the audience gets swept up in the argument.

However, if the audience fails to agree with your first point in the

chain, they will also tend to disagree with the rest of the chain. So it is very important to make sure that your argument is logically sound earlier on, and that each consequent point is fully explained and supported.

Narrative

Narrative arguments place events in some kind of chronological order, telling a story about something that happened (a crime, an injury). The Statement of Facts in an appellate brief usually takes the form of a narrative, but you may find other writing situations where a narrative may be useful.

Note, first, that narrative arguments are still arguments. That means that they have a persuasive purpose, so you should choose each element in the narrative with an eye toward that purpose. Not every detail is relevant or important for your claims, so highlight only those points that are important to provide background on the setting, characters, or events.

Also keep in mind that a narrative does not have to move exactly in chronological order. Novelists often jump around in a story, using flashbacks or cutting to different scenes to create a certain effect. You can do the same thing in a narrative, ordering the scenes and events you wish to include for maximum rhetorical effect.

Exercise 3.4

Read the following Statement of Facts from a fictional trial order on a motion to dismiss.

Then, consider how you could reorganize the fact pattern using the different persuasive strategies listed above. Write an outline of your new organizational scheme, and list the strategy you are employing to make each organizational decision.

> Plaintiff was formerly employed by Defendant as a Housekeeping Supervisor from December of 1993 through March of 1999. According to Plaintiff's complaint, while she was employed by Defendant, another employee physically attacked her and caused her injury. This attack is the basis for her sexual harassment claim. In addition, Plaintiff claims that her employer did not give her reasonable accommodation for her injury due to the attack when she returned to work. Instead, Defendant discharged her "due to medical leave." She was told by her male supervisor when she was first hired that her employer does not usually hire women to work in her position, and that her hiring would therefore be a problem.
>
> She alleges that her supervisor Lewis Pittman, the housekeeping administrator, treated her "unfairly," engaged in "unethical work practices," such as "obstruction" of her work. She gives as an example that Mr. Pittman "willfully hire[d] illegal immigrants to work, telling me not to discuss this information to anyone or my job would be in jeopardy; when I brought this information to attention of his boss Marion Peabody, retaliation started." The retaliation she describes includes not giving her "necessary supplies" such as "housekeeping products," "not having adequate equipment," and "not enough man-hour to get job done." Plaintiff also alleges that her supervisors "use my employees to seek revenge toward me." Plaintiff filed her complaint with the Equal Employment Opportunity Commission ("EEOC") in September of 2008. She received her right-to-sue letter from the EEOC on August 14, 2009.

§ 3.5. Signals

Once you have settled on an appropriate organizational strategy for your document, you must make sure that your organization is clear to your reader. Sometimes the arrangement seems so obvious to writers that they cannot understand why the arrangement choices might not be obvious to readers.

Your audience will need both visual and verbal signals to understand how a document is organized. Here are some signals that will help keep your readers on track.

§3.5.1. Verbal Signals

Verbal signals help to ensure that your audience is following your argument and its organization by telling them what is to come and what you, the writer, are trying to accomplish.

Forecasting

A forecast is an outline of your argument that you provide for your audience early on. For example, a prosecutor in a murder trial might open the trial with something like this:

> I will begin by explaining why Mr. Smith killed Mrs. Smith, then I will show how he did it, and finally I will explain why he should receive the death penalty.

Flagging

Flagging terms are words or phrases you use that tell the audience how a sentence or paragraph relates to what has come before it.

Some examples of flagging words are these:

- In addition
- Also
- In particular
- Nevertheless
- Next
- Furthermore

Our prosecutor might describe the murder defendant in this manner, using flagging terms to show the relationships between the descriptive sentences:

> The defendant is not only a cold-blooded killer. He is also an alcoholic and a drug addict. In particular, he abused heroin, and was intoxicated when he committed this murder. Nevertheless, he should be held fully responsible for his actions the night he killed his wife.

Enumeration

Here, you number and order the elements for consideration in a case. For instance, our prosecutor might say something like this:

> There are three reasons why Mr. Smith should get the death sentence. First, he killed his wife. Second, he killed her in a cold, calculating manner. Third, he killed her without showing any remorse for his actions.

Enumeration and Elimination

Here, you outline all of the possibilities in a case and eliminate all but one. (The Greek term for this strategy is *apophasis*; the Latin term is *expeditio*).

Returning to the example of our murder trial, the defense attorney might use enumeration and elimination to create a defense in this fashion:

> There are only two possible ways Mr. Smith could have strangled Mrs. Smith, and I will show you why neither of ways could have occurred. First, Mr. Smith could have used his bare hands. But we know Mr. Smith has severe arthritis and would not have the grip strength necessary to do so. Second, Mr. Smith could have used a rope or some such device, but no such device was found at the crime scene and there are no marks on Mrs. Smith's neck consistent with a rope or other device. The bruises on Mrs. Smith's neck are consistent with bare hands—just not Mr. Smith's hands.

§ 3.5.2. Visual Signals

Often, it is useful to use both visual *and* verbal organizational cues to ensure that your audience stays on track and can locate the

information you need. Visual signals indicate organization graphically. While the array of visual elements you have at your disposal depends in part on the genre you are writing, you can usually use at least some of these features to help your reader along.

Headings and Sub-Headings

The easiest way to indicate the organization of a document is to use headings and sub-headings to create a **graphical hierarchy**. A graphical hierarchy shows the reader not only *what* is important, but its *level of importance* based on the type of font, its size, weight, and so on. Most legal documents do not lend themselves to flashy fonts and colors, but you can still use font size, bolding, and so on to indicate importance.

Important: Be sure to use heading styles and numbering of headings consistently so as not to confuse your reader.

Spacing

You can also indicate organization by how you arrange items on a page. Generally, you should include more spaces *before* a new section heading than after the heading, so that it is clear "what goes with what." Putting a clear space between sections of information helps the audience to recognize organization visually.

Bulleted and Numbered Lists

Using lists can also help your audience to find information easily. If you are listing a number of items in no particular order, use a bulleted list. If you are listing a series of steps or arguments that require a specific order, use a numbered list. When writing lists, make sure to phrase each item using the same, parallel structure (i.e. all imperative sentences or all nouns). See § 4.4 on Eloquence, below, for more on parallel structures.

§ 3.6. Revision Activities

You can use the following activities at any stage in the writing process to help you focus on arrangement. Sometimes, you may find it useful to do one of these activities after you've written a draft of your document; at other times, they might help you get organized for a document or speech.

Storyboarding

A storyboard is like the blocks of a comic strip. Sketch out the order of a document using index cards for each "block" and then move them around or add/remove them. Storyboarding can be especially useful for any writing that recounts a series of events (i.e. the Statement of Facts in an appellate brief, an overview of a crime in an opening statement). Consider how you might arrange the blocks in a written narrative.

- What events will you depict in your blocks?
- What ones will you leave out?
- How will you order them?
- What will be the opening and closing scenes?

Reverse Outlining

A reverse outline is an outline you write *after* you have written a draft of your document. Have you looked back at the event that you're writing about and thought, "Gee, I wish I had done that differently"?

Try this. After you have drafted a Statement of Facts, write an outline of your text, identifying the purpose of each paragraph. Point out the places where you had to make a decision of some kind—what to leave in or leave out, how to organize. For each decision-making moment, brainstorm on the alternatives that you could have pursued. What other options were available? How do these other options affect the meaning of your document? Did you leave out any important facts? Are there any facts that do not contribute to your argument that you should remove?

"So What?"

As you read through your draft, ask the "So what?" question for each paragraph or event. Why did you include those details? Why are they important? Why did they matter then, and why do they matter now? If the "so what" isn't clear in the draft, consider whether you need to make it clearer to the reader, or remove the point entirely.

Translation

Translation occurs when you describe a point in your document for an audience other than the one that you intend to have read the document. By translating, weaknesses in your reasoning and writing may become more clear. Try explaining the complex ideas in your document to your teenage child, or to your non-lawyer husband. Can you explain the ideas in a way this lay audience can understand?

Ask yourself, "How would this document change if I wrote it for readers of a newspaper or magazine? What would I leave out? What would I add? What would I describe in different language and style? How would the points that I emphasize change?"

Once you've thought about the differences, return to your working draft. Are the points that you chose to include that are wrong for your intended audience? Are there parts of your alternate version that can be added to your working draft to make it stronger?

§ 3.7. Chapter Summary

In this chapter, you have learned about the rhetorical principle of **arrangement**, or how to best select and organize arguments in a document or speech.

The first consideration in arrangement is, of course, your **audience**. Remember to keep your audience's interests, needs, and prior knowledge about the topic in mind whenever you write. Audiences can quickly become confused, bored, or irritated if the information you provide does not seem relevant to them. For legal writing, the attention of your audience can determine the success or failure of a case.

The second consideration for arrangement is **rhetorical effect**.

For each point you are considering, ask yourself whether that information is necessary from a rhetorical point of view. Does it contribute to your purpose? Does it make your case more persuasive—either from a logical, ethical, or pathetic point of view?

Once you have decided what information to include in a document, consider how best to frame and order that information given your audience and purpose. Determining the **type of case** you have at hand can help you to adjust your arrangement for maximum effect. For an **honorable** case, you can be more direct since your audience probably already agrees that the topic is timely and important. For a **difficult** case, you might need a more indirect approach, since your audience may be hostile or resistant. You may need to shift their focus away from their emotional reaction to the case towards a different issue, or you may simply need to acknowledge their concerns. For an **ambiguous** or **mean** case, you may need to begin by focusing your audience's attention on the issue-either by clarifying what is at stake or showing why it is important. And for an **obscure** case, you may need to do extra work to define key terms, provide background, and clarify the concepts and statues involved.

Whenever you are arranging information for a document, ask yourself: "Am I using the most persuasive arrangement possible? Could I arrange this differently?" Try out some **general principles of arrangement** to see whether you can't come up with a more effective ordering, such as placing the most important arguments first, or using a narrative, or even using climactic organization. Of course, these decisions will depend on your audience, the type of case, and the type of document you are writing.

Finally, be sure that your organization is obvious to your readers or listeners, not just to you. Using **verbal** and **visual** signals can help you to indicate how your document is organized. This makes it easier for your audience to find the information they are looking for (in a written document) or to remember an oral argument after the fact.

Chapter 4: Developing Eloquence: Style

§ 4.1. What is Style?

When we tell people that we teach writing to lawyers, their first comment inevitably has to do with the style of legal writing. People will say things like, "Oh, legal writing is so dry. Teach them to make it interesting!" or "Legal writing is just jargon. What is there to teach?" These comments all suggest that legal writing often fails to live up to some standard of "good" or "clear" writing.

From a rhetorical perspective, though, we insist that a good writing style is first and foremost a style that is appropriate to the rhetorical situation at hand. Writing can be full of jargon—and legal discourse often is—as long as the audience understands and expects that jargon. The considerations people normally identify with style, such as clarity, correctness, and eloquence, are to us secondary to the question of whether or not your style fits the **rhetorical situation**. (For more on the rhetorical situation, see § 1.2, above.)

In our teaching, we have found it useful to group style considerations into three categories, which we've titled **the "ACE" Approach**:

- **A**ppropriateness
- **C**larity
- **E**mphasis

The first consideration, appropriateness, relates to the suitability of your style choices to the rhetorical situation. The second, clarity, relates primarily to ensuring that complex legal information will be easy for your audience to understand. And the third consideration, emphasis, provides an important tool you can use to lend eloquence to your writing.

In the first part of this chapter, we explain how the ACE method can help you to expand your awareness of stylistic options and to develop a style that suits your purposes. In the second part, we provide examples, exercises, and advice to help you to proofread and edit your own writing—a key skill for accomplished writers in any field.

§ 4.2. Appropriateness

The first consideration of the ACE approach, **appropriateness**, helps you determine whether you have chosen a suitable style for your particular rhetorical situation.

§ 4.2.1. Levels of Formality

Ancient rhetoricians outlined three types of style for speakers to choose from: **grand style**, **middle style**, and **plain style**. The grand style was marked by rhetorical flourishes, highly formal structures, and complex sentences. Rhetors used this style for ceremonial occasions and serious topics. On the opposite end of the spectrum, the plain style employed fewer rhetorical flourishes, simpler sentences, and a more direct approach. The middle style, obviously, lay somewhere in the middle, using somewhat simpler forms than the grand style, but including some rhetorical figures (such as metaphors, analogies, or repetition).

Today, we very seldom use the same type of "grand style" that the ancients used—even very formal occasions tend to be a little more relaxed than in days past. Consider, for instance, the informal language used by presidential candidates at campaign events or by speakers at weddings or funerals.

Instead of the ancient system, we suggest that legal writers think about language in terms of levels of **formality**.

Linguists identify the following five levels of formality
1. Frozen
2. Formal
3. Consultative
4. Casual
5. Intimate

Intimate language is language you use only with your closest friends and family members, and includes terms of endearment

("honey" or "shmoopy"), slang ("what's up?"), and short forms ("Bye!" "ttyl"). This style is rarely (if ever) appropriate in professional contexts, so we won't discuss it further here.

Casual language might be more common in informal conversations with co-workers; here you would find simpler sentence structures, contractions, and nearly every other type of grammatical construction your high school English teacher probably warned you not to use when you write (i.e. "you" or "I"). Increasingly, though, some elements of casual language are acceptable in professional writing, especially when they are mixed with more formal structures (see Consultative Language, below).

The personal "I," for instance, appears quite commonly in legal writing, even in formal documents such as court opinions. In certain genres, then, the "I" works to distinguish the writer's opinion from the arguments of others.

Consultative language mixes some casual forms with more formal stylistic elements. Most professional correspondence, these days, falls in the consultative range. Thus, you won't be surprised to find contractions or the personal voice in professional writing (as this sentence indicates). One of the benefits of the consultative level is that it can make complex information easier to understand, and it creates a friendlier tone than formal language.

In legal contexts, oral communication may fit in this category, but it depends on whom you are speaking to. For example, by addressing the judge as "Your honor," you are invoking a higher level of formality. Professional correspondence can also fit in this category, depending again on the audience.

Formal language tends to avoid many of the "casual" elements mentioned above, in favor of a more impersonal style. Formal documents may rely heavily on the passive voice and impersonal sentence constructions. Most legal writing fits in this category, including motions, briefs, and memos, although they often include some elements of the consultative style (e.g., use of "I" to indicate professional opinion).

Frozen language eliminates all casual elements of language, relying instead on passive and impersonal sentence constructions. It also tends to include archaic language or Latin terminology (*ipso facto, inter alia,* etc.). Contracts sometimes fit in this category.

Consider the following excerpt from a sample contract:

> It is a condition of this Service Contract that the Lease Contract come into, and continue in, full force and effect upon signing of the Service Contract, and it is a further condition to this Service Contract that in the event the Lease Contract is canceled, expires, or otherwise terminates, this Service Contract shall ipso facto and automatically cease and terminate.

This sample could be considered "frozen" because of the unusual grammatical structures and terminology—few of us really use phrases like "full force and effect" or "ipso facto" in our day-to-day speech or writing. While writing in the frozen range may sometimes be appropriate to the context, audience, and genre, it tends to be confusing and difficult for readers to understand.

Today, some legal genres have begun to move away from the frozen register for this reason; legal contracts may now include personal voice (e.g. "you" instead of "the lessee") or other markers of formal or consultative language. In recent years, the Plain English Movement in legal writing has encouraged the abandonment of much of the frozen style.

§ 4.2.2. Choosing an Appropriate Level of Formality

When you decide which level of formality to use in your writing, you should base the decision not on abstract stylistic rules, but rather on your analysis of the rhetorical situation and the level of appropriateness the situation requires.

The level of formality might be shaped by the following conditions:

- Your relationship to your audience,
- Your status relative to your audience,
- The genre you are composing, and
- The time and place in which you are writing.

For instance, if you are writing a letter to a client, you are addressing someone who has sought your expertise in an area they know little about, which dictates a less formal style. At the same time, most lawyers strive to keep professional distance in their

relationships with their clients, which dictates a more formal style. Thus, lawyers often write client letters in the consultative style, balancing the need for lay language with the need for professional distance.

If you are addressing a judge, though, you are speaking to a superior—someone whose status is higher than yours and whose position commands a certain amount of respect. In this case, the formal level might be more appropriate.

In summary, some genres require a more formal style than others: e-mail is generally a less former genre than a brief. Certain times and places also call for greater formality: the courtroom is generally a solemn place, demanding a more formal style than the office.

§ 4.2.3. Appropriateness and Correctness

Often, we are taught that certain stylistic choices are simply incorrect. As we mentioned above, your high school or even college English teacher may have told you never to use a contraction, or never to use the personal voice in your writing.

However, from a rhetorical perspective, all stylistic choices are rhetorical choices. This means there's no absolute right or wrong when it comes to style, but rather choices you make in keeping with your understanding of appropriateness.

In fact, sometimes choosing the "incorrect" option actually leads to clearer writing. Consider the following examples:

> A-1. "Upon consideration of the case, **it was decided that** *pro bono* representation is not possible at this juncture."
>
> A-2. "After reviewing your case, **we decided that** it would not be possible for us to represent you at this time without charging a fee."
>
> B-1. "In contrast with the lower court's opinion, **it is evident that** requiring locks on guns protects our children's safety."
>
> B-2. "In contrast with the lower court's opinion, **I argue that** requiring locks on guns would protect our children's safety."

Notice how the impersonal and passive structures in A-1 and B-1

obscure the meaning of each sentence. Writers trained to avoid the personal pronouns "I" and "you" often go to such great lengths to leave them out that they end up with tangled, confusing sentences. The revised sentences (A-2 and B-2) are still sufficiently formal for nearly all legal writing contexts, even if they use the more "casual" personal pronouns ("we" and "I").

We will discuss clarity in more detail in the next section; for now, note that a lower level of formality can, at times, actually make your writing more effective.

§ 4.2.4. Adjusting Levels of Formality

As an accomplished writer, you should learn to adjust your level of formality strategically, in keeping with the rhetorical situation.

Sometimes, you may want to increase the level of formality in a document, even if increasing formality decreases clarity. Once, a technical writing professional we know was hired to write documents for a law firm. When she turned in her first set of documents to her employers, the lawyers protested that she had made the information too simple and not "lawyerly" enough. To fix the problem, she revised the documents by increasing the level of formality, which simultaneously made the documents more appropriate for their audience.

If you are writing or speaking about highly technical matters, incorporating some informal style elements will actually make these matters easier for your audience to understand. Using informal language can be especially helpful when you are explaining complex legal or scientific concepts to an audience that is not familiar with those concepts, such as a jury or client. Adding a few elements of informal style can balance out the technical content without necessarily making the document too informal overall.

Table 4.1. Qualities of Language Formality

Relatively Formal	Relatively Informal
Third person pronouns (He/she/it, they)	First person pronouns (I/we; you)
Full negation (will not, is not)	Contractions (won't, isn't)

Titles and honorifics (Sir, Your Honor)	Names (Ms. Smith, Jane Smith... and even less formally, Jane).
Passives and impersonals (Clearly the butler was shot by her" or "It is clear that she shot the butler.)	Active voice (She shot the butler.)
Nominalizations (Hung juries are a rare occurrence).	Active verbs (Hung juries rarely occur).
Clichéd language (As per your letter of September 9, 2008...)	Natural language (I am writing in response to your letter of September 9, 2008)

Exercise 4.1

Revise the following passages, taken from real legal documents, to **decrease** the level of formality:

1. The arguments were presented by the parties, and Mr. Huckins made his allocution. Subsequently, the response of the court was that it was not ready to impose sentence. The court discussed that it was troubled by this case because Mr. Huckins did not fit the characteristics of the typical defendant who possesses child pornography and that he was not prosecuted until a year and a half after the seizure of his computer. The court also noted that Mr. Huckins was exceptionally cooperative with law enforcement, and it referenced the letters it received on behalf of Mr. Huckins.[14]

2. An employee should note that if a claim is denied North Carolina Industrial Commission Claim Form 18 must be filed within two years from the date of injury or, in the case of an occupational disease, within two years from the date the employee is advised by "competent medical authority" of the work related nature of his or her disease or condition and the onset of disability. This is an absolute rule and the failure to file a Form 18 within the period required means that the claim is forever barred, no matter how meritorious.[15]

---

[14] U.S. v. Scott James Huckins, 529 F.3d 1312, 1316 (10th Cir., 2008).

[15] N.C. BAR ASSOCIATION, THE IS THE LAW: WORKER'S COMPENSATION: WHAT TO DO IN THE CASE OF AN ON-THE-JOB INJURY (2005, rev. 2009).

§ 4.2.5. Levels of Technicality

In addition to formality, you should always consider the level of technicality of your writing. Legal writing, like scientific and technical writing, often involves terms of art, or **jargon.**

While the word carries negative connotations, jargon is not necessarily a bad thing. Terms of art are an essential part of legal writing, and carry special meaning to those within the rhetorical community of lawyers. While these terms are familiar to experts, however, they can be difficult for non-specialists such as jurors and clients to understand. Accordingly, you should always tailor your language to your audience.

For specialist audiences, technical terms can clarify meaning, but they can still slow down one's reading speed and comprehension. Try the following techniques:

- Use the given-new contract (see below) to make sure that technical terms don't seem to arise out of nowhere.
- Focus on using concrete, active verbs wherever possible.
- If you think your reader might not remember what a term means, provide a brief definition, perhaps by providing a synonym in parentheses.

For non-specialist audiences, too many technical terms can be overwhelming. This does not mean that you must avoid specialized terms altogether. Instead, consider the following suggestions:

- Temper technical terms with less formal language (see above). The more technical your language, the more informal elements you might add.
- Use more informal or simple sentence structures—focus on putting difficult terms towards the end of a sentence, and place the subject and verb at the start of the sentence. (See the section on the given-new contract, below).
- Provide definitions for technical terms—you might need to devote more time to this for non-specialist audiences than for experts.

Exercise 4.2

First, rank the passages below from least technical to most technical.

Then, revise one of the passages below to change the level of technicality.

Passage 1

Reasonableness review is comprised of a procedural component and a substantive component. United States v. Smart, 518 F.3d 800, 803 (10th Cir. 2008). Procedural reasonableness addresses whether the district court incorrectly calculated or failed to calculate the Guidelines sentence, treated the Guidelines as mandatory, failed to consider the § 3553(a) factors, relied on clearly erroneous facts, or failed to adequately explain the sentence. Gall, 128 S. Ct. at 597. Relevant here, substantive reasonableness addresses "whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)." United States v. Verdin-Garcia, 516 F.3d 884, 895 (10th Cir. 2008) (internal quotations omitted).[16]

Passage 2

Although the district court based its ruling on a finding that GlowProducts imported its goods into the United States, we believe that the preferable initial inquiry, given the facts of this case and our prior established law, is whether there was a sale within the United States. It is uncontested that GlowProducts sold and shipped the allegedly infringing products directly to customers located in the United States.[17]

Passage 3

Strains of the bacteria *Bacillus thuringiensis* ("Bt") produce proteins, known as Bt toxins, that while harmless for humans and most animals, are toxic to certain crop-destroying insects. In the

---

16 U.S. v. Scott James Huckins, 529 F.3d 1312, 1316 (10th Cir., 2008).

17 Litecubes, LLC & Carl R. Vanderschuit v. Northern Light Products, 523 F.3d 1353, 1359 (Fed. Cir. 2008).

1980s multiple companies and academic groups took advantage of the newly emergent science of genetic engineering by attempting to insert a gene for Bt toxin into plants through a process known as transformation. The goal was for these genetically engineered plants to express (i.e., produce) a Bt toxin protein in sufficient quantities to make the plants insect-resistant. Difficulties in getting plants to express a full-length Bt toxin gene, which encodes a protein of approximately 130 kD,2 led researchers to investigate various alternatives.[18]

Revise One Passage Here:

---

[18] Monsanto Company v. Bayer Bioscience 514 F.3d 1229, 1238 (Fed. Cir. 2008).

Answer Set 4.2

Most Formal: Passage 1

Middling Formal: Passage 3

Least Formal: Passage 2

The first passage uses many impersonal and passive voice constructs. The third passage uses a greater number of active sentences, but the scientific content raises its level of formality. The second passage is the least formal, using first person plural (we), but it still qualifies as consultative.

Here is a re-write of the second passage that makes it less formal:

A reasonableness review includes a procedural component and a substantive component. In a procedural review, the judge considers five possibilities: whether the district court 1) incorrectly calculated or failed to calculate the Guidelines sentence, 2) treated the Guidelines as mandatory, 3) failed to consider the § 3553(a) factors, 4) relied on clearly erroneous facts, or 5) failed to adequately explain the sentence. *Gall*, 128 S. Ct. at 597. In this case, the substantive reasonableness component is relevant. This component addresses "whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)." United States v. Verdin-Garcia, 516 F.3d 884, 895 (10th Cir. 2008) (internal quotations omitted).

§ 4.3. Clarity

Clarity refers to making reader-oriented choices in your writing. When composing and revising, your goal should thus be to make choices that will make your writing clear to *your reader*, not just to you.

§ 4.3.1. Concrete Verbs

Many technical writing studies have shown that using active verbs increases speed of reading and comprehension.

Legal writers are commonly known for their obscure, dry writing—or at least that is the perception. But legal writing need not be incomprehensible. One of the easiest ways to make legal writing sharper and clearer is to use concrete verbs.

Consider the following example:

> In fact, bereft of supplication of the discovery documentation specified in defendant's Request to Produce, any documents produced by plaintiff's geothermal expert **are** mere opinions unsupported by evidence, facts, authority or the like.

Notice that in this sentence, the wimpy verb "are" supports a long chain of complex words strung together at the start of the sentence. Quite often in legal writing, weak sentences include several versions of the verbs "to be" or "to have"—verbs that don't carry the same kind of active force as other, stronger verbs.

Now consider this revision, which starts with a subject and a concrete verb:

> The geothermal expert failed to **produce** sufficient facts to support his opinion.

In this revision, we highlighted the weak verb "are" and asked what *action* the sentence really described—a failure to produce—and the agent doing the action—the geothermal expert. This pairing of agent and action became the basis of the revised sentence.

When you find unclear sentences in your own writing, try asking yourself "Who is doing what?" This simple question can help you to identify the subject and the action for your sentence. Now, all you

need to do is start your sentence with this information, find a verb that expresses the action, and you'll have a clearer sentence.

Exercise 4.3

For the following sample sentences, identify the "who" and the "what" (i.e. the action). Then, revise the sentence to make it clearer.

1. If there is material destruction of the Unit without fault of the Purchaser, this Contract shall be deemed cancelled.

2. The appellant's failure to meet the burden is due to his misunderstanding of the equitable tolling standard.

3. Deferred to phase 2 were potential measures that required further study and possibly more detailed and formal environmental analysis.

4. Smith's state habeas petition is explicit in its invocation of due process.

Answer Set 4.3

Here are some possible answers to the exercises above. Note that there are many revision possibilities for each sentence.

1. If you find any material damage to the Unit that you (the Purchaser) did not cause, we will cancel this contract.

Here, we switched this sentence to the active voice and to the second person (you) and first person plural (we) forms, which make this sentence clearer.

2. The appellant failed to meet the burden because he did not understand the equitable tolling standard.

Here, we changed the nouns—"the apellant's failure", "misunderstanding" to verbs—"failed" and "did not understand." This simple change improved the clarity of the sentence.

3. We deferred a few measures until phase 2 because they require a more detailed environmental analysis.

In this case, we asked "who deferred these measures?"—and changed the subject of the sentence to "We," accordingly.

4. Smith's state habeas petition explicitly invokes due process.

Here, we asked "what is the action of this sentence?"—invokes. Once we identified the action, and made it the central verb, the sentence became much clearer.

§ 4.3.2. Verbosity and Sentence Length

Professional legal writers are often advised to improve clarity by cutting out unnecessary words. The logic is this: legal writers are pressed for time, therefore, the fewer words they have to read, the better. Legal writers are thus advised to use short, simple sentences and to avoid extra words.

However, this advice, like much of the advice we come across about writing style, ignores the rhetorical context and instead advises abstract rules. Remember, in certain rhetorical contexts, less is not always more.

Consider the following example from an adapted appellate brief:

> It was around 11:30 PM the night of June 19, 2007. Melvin Peabody, patrolman for the town of Carbon, North Dakota, was standing in the middle of East Tacoma Road. He wore no reflective clothing. Two scooters approached out of the darkness from a rise in the roadway some 600-700 feet away. The drivers saw vehicles on both side of the roadway with lights. They did not see Officer Peabody in the middle of the roadway until almost upon him. The first driver was able to take evasive action at the last moment. He avoided contact with Officer Peabody. The second driver, the defendant, Igor Maple O'Shandy, was riding directly behind the first scooter. He attempted to break and evade the officer. His scooter struck Officer Peabody in spite of this attempt.

In this passage, the short, simple sentences are pretty easy to understand. But they also make this passage boring. The rhetorical purpose of an appellate brief is partly to draw the reader in, to create a convincing and dramatic narrative of the events in question. But the dry, matter-of-fact style fails to contribute to that rhetorical purpose, even if it is easy to read.

§ 4.3.3. Clarity Tools

In fact, sometimes, an excessively "clear" writing style can be downright *unclear*. Instead of thinking of clarity just in terms of eliminating as many words as possible, think strategically about how to make your writing easier for audiences to read. We suggest a

couple of tools for improving clarity without simply cutting words: the **given-new contract**, **first and last position**, and **signposts**.

The Given-New Contract

One tool to improve the clarity and "flow" of writing is the **given-new contract**. As lawyers, you are familiar with the meaning of the term "contract": an agreement between parties, supported by consideration, which creates a duty to perform or not perform a (hopefully lawful) thing.

The given-new contract is a contract between a writer and her reader, governing how the writer transfers knowledge to the reader. Business communication expert Thomas L. Kent defines the contract in this way:

> The Given-New Contract is a theory which describes the process of information transfer occurring through spoken and written discourse. The contract is an extension of Grice's "Cooperative Principle," the dictum that speakers and listeners must cooperate with one another in the quantity, quality, relation, and manner of their communications. . . . Communicators must agree that while communicating they will share a "mental world" where all parties know what is given information and what is new.[19]

The given-new contract suggests that, at the sentence level, information shared by the writer and reader should come first. This information composes the shared "mental world" of the writer and reader. Only after presenting the shared information may the writer present new information. This new information should always be placed toward the end of a sentence, thereby enlarging the body of shared knowledge. This is much easier to understand in practice.

Take the following example:

> A. The scooter struck a policeman. Officer Peabody was his name.

---

19 Thomas L. Kent, *Paragraph Production and the Given-New Contract*, 21 JOURNAL OF BUSINESS COMMUNICATION 45, 46 (1984).

> B. The scooter struck a policeman. His name was Officer Peabody.

To most readers, sentence B. sounds more natural. Why is this the case? In this example, the new piece of information in the second sentence is "Officer Peabody." Since we already know from the first sentence that a policeman was struck, we can also surmise that he has a name (since everyone does). Examine where the new information is placed in each of these sentences, and where the shared, or "given" information is placed:

> A. The scooter struck a policeman. Officer Peabody | was his name.
>
> B. The scooter struck a policeman. His name was | Officer Peabody.

Putting the new information at the beginning of the sentence has a jarring effect; putting the new information at the end of the sentence eases readers into it, so we are less likely to be confused. While the name example may seem frivolous, legal writing is often full of names, whether they are names of individuals involved in a crime, or names of legal cases. Introducing names at the end of sentences can help audiences to grasp them better.

The given-new contract also works effectively if you need to introduce a **technical term or concept**. Consider this example from a patent and copyright case:

> Two types of products sold by GlowProducts are at issue, the **EXA cubes** and the **ICM cubes** (which include the "8 Mode Multi Cube" and the "3 Setting Flashing Lighted Ice Cube"). Both products are artificial ice cubes containing an L.E.D. and battery. **The EXA cubes** are nearly identical to the Litecube product ("the Litecube") and include a power source [...] **The ICM cubes** are a different shape than the Litecube and, thus, were not alleged to have infringed the Litecube Copyright. Nor do they have a reciprocally

> translating power source.[20]

In this passage, the technical terms "EXA cubes" and "ICM cubes" are introduced at the end of the first sentence, and then repeated at the beginning of the third and fourth sentences, respectively. This helps the reader grasp the new terms more easily.

Finally, the given-new contract works well if you need to describe a **process or series of steps**. Consider the following example:

> A payphone customer making a long-distance call with an access code or 1–800 number issued by a long-distance carrier **pays the carrier** (which completes the call). **The carrier** then compensates the payphone **operator** (which connects the call to the carrier in the first place). The payphone **operator** can sue the long-distance carrier for any compensation that the carrier fails to pay for these "dial-around" calls. Many payphone **operators** assign their dial-around claims to billing and collection firms (aggregators) so that, in effect, these **aggregators** can bring suit on their behalf. A group of **aggregators** (respondents here) were assigned legal title to the claims of approximately 1,400 payphone operators.[21]

In this example, the given-new contract helps to link each sentence with the one before it (emphasized here by the boldfaced words), making it easier for the reader to understand each step in this process.

First and Last

Another tool for improving clarity in your writing is **focus**. To improve focus, think about how your writing directs the audience's attention to the **most important information**.

---

[20] *Litecubes, LLC & Carl R. Vanderschuit v. Northern Light Products*, 523 F.3d 1353, 1359 (Fed. Cir. 2008).

[21] *Sprint Communications v. APCC Services* (2008): 554 U.S. _____, Slip Op. at 1 (2008).

In general, readers focus most on the first and last parts of each sentence and paragraph. The principle of focus suggests that you should put the most important information in these places, rather than burying them in the middle of a sentence or paragraph. Here is an example from a court opinion:

> After calculating the Guidelines range of 78 to 97 months, the district court initially indicated that the § 3553(a) factors justified a downward variance to a range of 36 to 48 months, but ultimately imposed a sentence of 18 months. The government challenges the substantive reasonableness of this sentence, arguing that the district court's justification for granting a downward variance of 60 to 79 months from the Guidelines range was not sufficiently compelling or supported by extraordinary facts. We disagree.[22]

Notice how this passage ends with a short, emphatic statement: "We disagree." In general, a reader's attention is naturally drawn to this last sentence, and in this opinion the court takes full advantage.

Now consider this example:

> The district court, in its memorandum and order following the inequitable conduct bench trial, carefully reviewed all of this evidence, quoting extensively from the testimony of both Meulemanns and Mariani. The court found Meulemanns' testimony to stand in "sharp contrast" to Mariani's detailed deposition testimony and **determined that Meulemanns was not credible** in claiming not to have known nor understood the content of the notes despite having discussed them with Mariani.[23]

Here, the most important information in the second sentence is stuck in the middle. The sentence would be clearer and more emphatic if it read as follows:

---

[22] *U.S. v. Scott James Huckins*, 529 F.3d 1312, 1318 (10th Cir., 2008).

[23] *Monsanto Company v. Bayer Bioscience* 514 F.3d 1229, 1238 (Fed. Cir. 2008).

> The court found that Meulemann's testimony stood in "sharp contrast" to Mariani's detailed deposition testimony. Meulemann claimed not to have known or understood the content of the notes, even though he admitted he discussed them with Mariani. **Ultimately, the court determined that Meulemanns' testimony was not credible.**

In the revised version, we have moved the key information—the credibility of the witness—to the end of the paragraph, where readers are more likely to focus their attention.

Signposts

Readers find it easier to locate information when you tell them where to look for it. Whenever possible, consider how you can use signposts in your writing. Consider these examples:

> Turning to the test for personal jurisdiction to which these rules of review apply, our analysis begins with **two questions. First**, we ask whether any applicable statute authorizes the service of process on defendants. **Second**, we examine whether the exercise of such statutory jurisdiction comports with constitutional due process demands.[24]

> **In this arena**, the Supreme Court has instructed that the "minimum contacts" standard requires, **first**, that the out-of-state defendant must have "purposefully directed" its activities at residents of the forum state, and second, that the plaintiff's injuries must "arise out of" defendant's forum-related activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). **Additionally**, exercising personal jurisdiction over defendants must always be consonant with traditional notions of fair play and substantial justice. *Int'l Shoe*, 326 U.S. at 316. **While** these elements afford some shape to the due process inquiry, each is, **as we shall**

---

24 *Dudnikov & Meadors v. Chalk & Vermilion*, 514 F.3d 1063, 1071 (Fed. Cir. 2008).

see, not without its own interpretative difficulties.[25]

In each of these passages, the highlighted words help to direct the reader's attention: they signal to readers what is coming ahead and how sentences relate to each other.

Even if they add to the total word count of your document, when used judiciously, signposts improve clarity.

---

25 *Dudnikov & Meadors v. Chalk & Vermilion,* 514 F.3d 1063, 1072 (Fed. Cir. 2008).

Exercises 4.4

1. Revise the following paragraphs to make better use of the **given-new contract**.

1-A. The main functions of a computer system are carried out on a microprocessor, or central processing unit, which interprets program instructions, processes data, and controls other devices in the system. A set of wires, or bus, connects the microprocessor to a chipset, which transfers data between the microprocessor and other devices, including the keyboard, mouse, monitor, hard drive, memory, and disk drives.[26]

1-B. If the claim is not settled through mediation then it is referred to a Deputy Commissioner, a judge with the Industrial Commission, for a hearing. Evidence is actually presented in open court through live testimony of witnesses. Medical records are usually stipulated into evidence and any medical testimony that needs to be taken from any physician or physicians is usually done by way of a post-hearing deposition in the physician's office.[27]

---

[26] *Quanta Computer v. LG Electronics*, 554 U.S. _____ (2008), Slip Op. at 2.

[27] N.C. BAR ASSOCIATION, THE IS THE LAW: WORKER'S COMPENSATION: WHAT TO DO IN THE CASE OF AN ON-THE-JOB INJURY (2005, rev. 2009).

2. Revise the following passages to make better use of the **first and last position**. First, highlight the most important information. Then, if that information is not in the first or last position of a sentence or paragraph, revise it accordingly.

2-A. If an employee believes that he or she has a compensable claim it is important that a Form 21 filed. If none of these things are done, or if the claim is denied, then the employee must be sure that Form 18 is filed within thirty days. It can be filed within two years of the date of the claimed injury or within two years of the time the employee is told by a physician or other competent medical authority that he has or may have a job related condition or disease, as long as the employer is not prejudiced by the delay in filing.[28]

2-B. We do not suggest that all internal documents of potential relevance must be submitted to the PTO as a matter of course. Rather, the internal documents are rendered material by the particular circumstances in this case.[29]

---

[28] N.C. BAR ASSOCIATION, THE IS THE LAW: WORKER'S COMPENSATION: WHAT TO DO IN THE CASE OF AN ON-THE-JOB INJURY (2005, rev. 2009).

[29] Monsanto Company v. Bayer Bioscience 514 F.3d 1229, 1241 (Fed. Cir. 2008).

3. Revise the following examples to make better use of **signposts**.

3-A. A district court has no discretion to decide whether a patent is unenforceable once it enters a finding of inequitable conduct. This court has long held that the unenforceability of a patent follows automatically once a patent is found to have been obtained via inequitable conduct. Jurisdiction to decide whether a patent was obtained through inequitable conduct necessarily includes the jurisdiction to declare a patent unenforceable as a result of that inequitable conduct.[30]

3-B. The government conceded to the district court that some variance was appropriate. The government advised the court that it was unopposed to a downward variance to 48 months. Aplt. App. at 73. Despite the government's argument on appeal that a variance of 60 to 79 months is inappropriate, a variance of 30 months

---

[30] *Adapted from* Monsanto Company v. Bayer Bioscience 514 F.3d 1229, 1244 (Fed. Cir. 2008).

separated the parties' positions before the district court.[31]

---

[31] U.S. v. Scott James Huckins, 529 F.3d 1312, 1318 (10th Cir., 2008).

Answer Set 4.4

1. Given-New Contract

1-A. The main functions of a computer system are carried out on a microprocessor, or central processing unit, which interprets program instructions, processes data, and controls other devices in the system. The microcompressor connects to a chipset by a set of wires, or bus, which transfers data between the microprocessor and other devices. These devices include the keyboard, mouse, monitor, hard drive, memory, and disk drives.

1-B. If the claim is not settled through mediation, then it is referred to a Deputy Commissioner, a judge with the Industrial Commission, for a hearing. During the hearing, witnesses may present evidence in open court. This evidence may include medical records, if both parties agree to their inclusion. If medical testimony is needed, a physician will be asked to provide it after the deposition.

2. First and Last

2-A. If an employee believes that he or she has a compensable claim it is important that a Form 21 filed. If none of these things are done, or if the claim is denied, **then the employee must be sure that Form 18 is filed within thirty days.** It can be filed within two years of the date of the claimed injury or within two years of the time the employee is told by a physician or other competent medical authority that he has or may have a job related condition or disease, as long as the employer is not prejudiced by the delay in filing.

If the employee believes that her or she has a claim that should be compensated, he or she should submit form 21. If the claim is denied, the employee has 30 days to submit Form 18.

If more than 30 days has passed, the employee may still submit Form 18, as long as no more than two years have passed since the date of the claimed injury ***or*** *the date when the employee learned from a physician or competent medical authority that he or she*

had a job-related condition or disease. Note that in this case, the employer will often claim prejudice by the delay in filing.

2-B. We do not suggest that all **internal documents of potential relevance must be submitted to the PTO** as a matter of course. Rather, the internal documents are rendered material by the particular circumstances in this case.

We do not suggest that all internal documents of potential relevance must be submitted to the PTO. Instead, they should submit only those internal documents that are rendered material by the particular circumstances in this case.

3. Signposts

3-A. A district court has no discretion to decide whether a patent is unenforceable once it enters a finding of inequitable conduct. **Instead**, this court has long held that the unenforceability of a patent follows automatically once a patent is found to have been obtained via inequitable conduct. **In fact,** jurisdiction to decide whether a patent was obtained through inequitable conduct necessarily includes the jurisdiction to declare a patent unenforceable as a result of that inequitable conduct.

3-B. **Initially**, the government conceded to the district court that some variance was appropriate. At sentencing, the government advised the court that it was unopposed to a downward variance to 48 months. Aplt. App. at 73. **Therefore**, despite the government's argument on appeal that a variance of 60 to 79 months is inappropriate, a variance of 30 months separated the parties' positions before the district court. U.S. v. Scott James Huckins, 529 F.3d 1312, 1318 (10th Cir., 2008).

§ 4.4. Eloquence

Eloquence refers to the writer or speaker's ability to express his or her thoughts with fluency, force, and appropriateness.

In ancient times, rhetors practiced hundreds of rhetorical figures—memorable turns of phrases—in order to lend persuasive force to their speeches. While lawyers seldom use this "grand style" favored by ancient orators, they can nonetheless draw upon the occasional rhetorical flourish. You might think about using a rhetorical figure whenever you'd like to emphasize something in your writing. Here are some examples.

Repetition

Repetition creates emphasis. Repetition helps to keep an audience interested, to create memorable phrases, and to increase the emphasis or force of your statements.

The ancients had terms for several different types of repetition—figures in which the first part of a sentence was repeated, or the last part, or what have you. Here are some examples of repetition of words and phrases.

- **Because of** their bungling, they ignored the obvious clues. They didn't pick up paper at the scene with prints on it. **Because of** their vanity, they very soon pretended to solve this crime and we think implicated an innocent man, and they never, they never ever looked for anyone else.[32]
- Ruth Greenglass **has never been** arrested. She **has never been** indicted. She **has never been** sent to jail. Doesn't that strike you as strange?[33]

---

[32] Johnnie Cochran, closing argument in People v. Simpson (Calif. 1995), *available at* http://www.umkc.edu/faculty/projects/ftrials/Simpson/simpson.htm.

[33] Closing Argument of Emmanuel Bloch in *U.S. v. Rosenberg* (S.D.N.Y. 1952), *available at* http://www.law.umkc.edu/faculty/projects/ftrials/rosenb/ROS_TBLO.HTM

- Moussaoui stands before you today, an admitted **terrorist,** a convicted **terrorist,** a proud and unrepentant **terrorist**.[34]

Notice that repetition of words can occur at the beginning, middle, or end of sentences.

Parallelism

Repetition also functions on the level of grammatical structures, rather than words and phrases. By constructing parallel phrases or sentences, you create a rhythm that makes information easier for an audience to grasp, while simultaneously increasing emphasis.

- Those killers, part of the terrorist group al Qaeda, came up with their plan, **trained for it, practiced it, worked on it, kept it secret, and then carried it out**, hijacking four commercial planes on September 11 and crashing them on purpose to kill as many Americans as they could.[35]
- Here was a Major General in the Army who has just learned that a detainee was subjected to grave abuse, on his watch, in direct violation of his orders. One would have expected him **to go through the roof, to order heads to roll, to launch an immediate investigation** and he couldn't even be bothered.[36]

Metaphorical language

A **metaphor** is a figure of speech in which a word is used to describe a thing or action to which the word doesn't normally apply,

---

34 Opening Statement of U.S. Attorney Robert Spencer in *U.S. v. Moussaoui* (E.D.Va. 2006), *available at* http://www.law.umkc.edu/faculty/projects/ftrials/Moussaoui/zmspencer.html.

35 Opening Statement of U.S. Attorney Robert Spencer in *U.S. v. Moussaoui*, (E.D. Va. 2006), *available at* http://www.law.umkc.edu/faculty/projects/ftrials/Moussaoui/zmspencer.html.

36 Closing Statement of Major David J.R. Frakt in Favor of Dismissal, *U.S. v Jawad,* (C.S.R.T. 2008), *available at* http://www.aclu.org/national-security/detention/.

often to create a mental image in an audience. For example, if you were to describe the sun as a "big, yellow beach-ball," you would be employing metaphor to create an image.

Ancient rhetoricians developed an arsenal of figures that create visual images, often by using words in unconventional ways. You are probably familiar with some of these: metaphor, analogy, simile, and metonymy.

Essentially, all of these figures work by creating mental images for readers, often in ways that create an **emotional impact**, in rhetorical terms, a pathetic response.

> With these fateful and ill-advised words, President Bush, our Commander-in-Chief, perhaps unwittingly, perhaps not, started the U.S. down **a slippery slope, a path that quickly descended, stopping briefly in the dark, Machiavellian world of "the ends justify the means," before plummeting further into the bleak underworld of barbarism and cruelty**, of "anything goes," of torture.[37]

Here, the main metaphor is a visual image of a "path" to an "underworld." The path is slippery, it is down-hill, it is dark, it is Machiavellian, and it is cruel. This speaker has used powerful, image-filled language to portray the Bush Administration's decision to condone harsh interrogation techniques as a trip down to Hell.

Vivid description

Closely related to metaphorical language is the rhetorical figure of *enargeia*, or vivid description. Rather than creating imaginary pictures in the audience's mind, *enargeia* asks audiences to picture an actual event or image. Consider this example:

> September 11th, 2001 dawned clear, crisp and blue in the northeast United States. In lower Manhattan in the Twin Towers of the World Trade Center, workers

---

37 Opening Statement of U.S. Attorney Robert Spencer in *U.S. v. Moussaoui*, (E.D. Va. 2006), *available at* http://www.law.umkc.edu/faculty/projects/ftrials/Moussaoui/zmspencer.html.

> sat down at their desks tending to e-mail and phone messages from the previous days. In the Pentagon in Arlington, Virginia, military and civilian personnel sat in briefings, were focused on their paperwork. In those clear blue skies over New York, over Virginia, and over Pennsylvania, in two American Airlines jets and in two United Airlines jets, weary travelers sipped their coffee and read their morning papers as flight attendants made their first rounds.[38]

In this passage, U.S. Attorney Robert Spencer describes the morning of September 11th using descriptive language, encouraging the audience to visualize the calm before the terrorists' storm. Vivid description functions primarily on an emotional level, connecting the audience to concrete events that evoke strong feelings.

Final Tips to Improve Eloquence

- Whatever you read, whether it is for work or pleasure, keep an eye out for effective style (vivid description, metaphor, etc.). The same goes for oral language—pay attention to effective political speeches, for example.
- Keep a computer file or notebook where you copy interesting passages from documents you read—whether they are related to legal cases or not. Traditionally, rhetoricians suggested that their students keep a **commonplace book** of quotations, poems, and so on. The notebook we suggest would be a modern-day equivalent. Consider this an "inspiration file" that you can consult when you need ideas for an important document or oral statement.
- Create time in your writing process to revise your writing for eloquence. Look for places where you can use repetition, parallelism, metaphor, and vivid description.

---

[38] Opening Statement of U.S. Attorney Robert Spencer in *U.S. v. Moussaoui*, (E.D. Va. 2006), *available at* http://www.law.umkc.edu/faculty/projects/ftrials/Moussaoui/zmspencer.html.

Exercise 4.7

1. Rewrite the following sentences to improve parallelism.

> 1-A. The drug deal provided sufficient stressors to provoke a PTSD reaction in William that day. These stressors included that drug deals are dangerous, that the people involved will often be armed, that this deal involved a great deal of money and drugs, and that there was a language and cultural barrier that made communication unclear.

> 1-B. PTSD is an anxiety disorder in which a person responds to a traumatic event with intense fear or helplessness. The symptoms cluster in three groups: reexperience of the event, avoiding things that remind one of the trauma, and increased anxiety.

2. Identify the stylistic strategies used in these passages:

> 2-A. With these fateful and ill-advised words, President Bush, our Commander-in-Chief, perhaps unwittingly, perhaps not, started the U.S. down a slippery slope, a path that quickly descended, stopping briefly in the dark, Machiavellian world of "the ends justify the means," before

plummeting further into the bleak underworld of barbarism and cruelty, of "anything goes," of torture.[39]

2-B. Never mind the manner, which may or may not be good; but think only of the truth of my words, and give heed to that: let the speaker speak truly and the judge decide justly.[40]

---

39 Closing Statement of Major David J.R. Frakt in Favor of Dismissal of *U.S. v Jawad,* (C.S.R.T. 2008)), *available at* http://www.aclu.org/national-security/detention/.

40 Plato, *Socrates' Defense*, para. 1, APOLOGY (Benjamin Jowett trans.), INTERNET CLASSICS ARCHIVE, *available at* http://classics.mit.edu/Plato/apology.html.

Answer Set 4.7

Authors will provide if requested by the publisher.

§ 4.5. Editing & Proofreading

One of the best skills you can develop as a writer is the ability to revise and edit your own writing. When you spend a lot of time working on a text, it can be difficult to get enough critical distance to see where to improve. We recommend the following strategies:

1. Read your writing out loud. When you hear yourself speak, you'll be more likely to notice sentences that are wordy, unclear, or awkward.

2. If you come across a sentence that seems awkward, or if you are having trouble writing a sentence or getting an idea down on paper, stop and say out loud "What I'm trying to say is...." Often we express ourselves more naturally and clearly orally than we do in writing. If it helps, use a tape recorder.

3. Print out your document and read it on paper. Most of us are better editors on paper than on screen because you can get a full view of the document, making it easier to refer to different parts of the text.

4. Edit for **one element at a time**. For example, go through your text once and focus just on, say, appropriateness. Then, go through it again and check for clarity, or eloquence. By keeping just one goal in your mind as you re-read, you'll be able to identify more specific areas for improvement.

Table 4.1. Editorial Checklist

Use the following checklist to help you edit your own writing for these key points:

Element	Questions
Appropriateness	Is the level of formality appropriate for the audience? Is the level of technicality appropriate for the audience?
Clarity	Can I add more concrete verbs in my writing? Can I use the given-new contract to clarify meaning for the audience? Can I adjust sentences to focus the audience's attention on key information? (i.e., can I move key information to the first or last part of the sentence)? Can I make better use of sign-posts to keep the reader on track?
Eloquence	Can I use repetition to emphasize important ideas? Can I use parallelism to highlight key information? Can I use metaphorical language to evoke emotion? Can I use vivid description (enargeia) to paint a mental picture for the audience?

§ 4.6. Chapter Summary

In this chapter, we've addressed three key points of effective style.

Appropriateness

Refers to how well your style suits the audience and purpose of your writing. Skilled writers learn to adjust the level of formality of their writing, based on a range of situational factors: their relationship to the audience, their status compared to that of the audience, the genre they are writing, and the context for their writing. Appropriateness also means choosing a level of technicality that is suitable for the audience and situation.

Clarity

Refers to stylistic techniques you can use to avoid clunky, confusing writing. Focus on using concrete verbs, on linking new information to old information, and on taking advantage of the first and last part of each sentence. Use signposts to keep readers on track.

Eloquence

Refers to rhetorical elements you can use to emphasize important ideas or to evoke an emotional response. Repetition and parallelism can help to reinforce key information. Metaphorical language and vivid description can create an emotional link to your audience.

Chapter 5: Writing the Right Thing: Ethics

§ 5.1. What Does Writing Have To Do with Ethics?

The Answer: Everything. Writing is language, and language is one of the most powerful forces of human civilization.

We are teaching you powerful tools for persuading and influencing people. Lawyers are experts, to whom jurors, clients, other lawyers, and judges turn for advice about how they should act. It is important that lawyers recognize the persuasive power that they wield, and think about the most ethical uses of this power.

The first rhetoricians, the Sophists, were sometimes accused of being "guns for hire," willing to argue any side of a case, whether right or wrong. (Sound familiar? These accusations have been leveled at lawyers, too.)

The Sophists were also accused of teaching persuasive tools—that is, *power*—to just about anyone, regardless of whether the student would use the power ethically.

We gave a short introduction to ethics in the first chapter of this handbook. In this chapter, we will expand on these ideas. We discuss the ethics of persuasive legal writing and ways to avoid misleading an audience.

This chapter is divided into four sections:

1. Bad Reputations
2. Lawyers and Ethics
3. Abuse of Emotional Appeals
4. Rhetorical Fallacies

§ 5.2. Bad Reputations

As we talked about in Chapter 1, rhetoricians and lawyers share a similar public relations problem.

In fact, "rhetoric" itself has a terrible reputation. We put the word in quotes, because when the R-word is spoken in public discourse, it often refers to a misunderstanding of what rhetoric actually is. When the media refers to "rhetoric," for example, most often they mean double-talk or shady language, for example, the language used by politicians to deceive the electorate.

Rhetoric's public relations problem is not new. Aristotle addresses the problem in his textbook on rhetoric. In the very first chapter, Aristotle addresses the bad reputation suffered by rhetoric in his community, and defends rhetoric as a study and a practice:

> And if it be objected that one who uses such power of speech unjustly might do great harm, that is a charge which may be made in common against all good things except virtue, and above all against the things that are most useful, such as strength, health, wealth, generalship. A man can confer the greatest of benefits by a right use of these, and inflict the greatest of injuries by using them wrongly. (Book 1, Chapter 1)

With these words, Aristotle admits that speech has great "power," and might do "great harm"—but the risk is no different than that of any other powerful force. The point, according to Aristotle, is to use avoid using them "wrongly."

This is where *ethics* comes in.

Despite the accusations of bad behavior leveled at rhetoricians by philosophers such as Plato, the link between rhetoric and ethics has always been strong. Ancient Roman rhetoricians described the ideal rhetor as "the good man speaking well"—someone who upheld and furthered the highest moral values of the community and nation.

Rhetoric's public relations problem should be familiar to lawyers, because lawyers have a similar problem. Often, lawyers have a bad (and largely undeserved) reputation for being unethical. Lawyers are the butt of many jokes that suggest that lawyers are money-grubbing, deceptive, and will represent anyone, even unethical

people.

You probably disagree with this assessment. You are right, for the most part. Just like the word "rhetoric" itself, lawyers get a bad rap. After all, most lawyers don't make the millions we hear about on T.V. Most don't purposely try to muddle the facts of a case. And most do in fact discriminate among prospective clients, refusing to represent unsavory characters.

Exercise 5.1

1. What is the biggest ethical challenge you have faced in your legal career? (No incriminating statements, please.)

2. How did you resolve this challenge? Did you ask for help? Did you look to the Rules of Professional Conduct (RPC) of your jurisdiction?

3. Do you feel good about your decision? Why or why not?

§ 5.3. Lawyers and Ethics

We believe that ethical strength can be learned, and should be taught. Most legal educators agree. Law schools work to instill ethical values in their students, and teach professional responsibility to law students. The American Bar Association requires law students to take a national professional responsibility exam. Most states have an ethics component in Continuing Legal Education requirements. Most states have a character and fitness component on their bar exams. These are just a few of the ways that lawyers self-regulate to ensure that we practice ethically.

How Lawyers Ensure Ethical Legal Practice

- Rules of Professional Conduct/Responsibility
- Bar oversight and sanctions
- Legal education Professional Responsibility course requirements
- Character and Fitness component of Bar Exams
- Ethics CLE requirement

Let's examine a rule of conduct more closely. As most lawyers learned in law school, the ABA has issued Model Rules of Professional Conduct (MRPC). Examining some of these rules highlights the relationship between language and ethics in the practice of law.

Section 3.3 of the MRPC is titled "Candor Toward the Tribunal." A lot is required of a lawyer in the name of candor. Here is the rule, with certain parts highlighted by us:

> (a) A lawyer shall not **knowingly**:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction **known** to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

> (3) offer evidence that the lawyer **knows to be false**. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who **knows** that a person intends to engage, is engaging or has engaged in criminal or **fraudulent** conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
>
> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
>
> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

The rule excerpted above highlights the theory that disclosure of a false or fraudulent statement—a lie—to the tribunal is only required if the lawyer has knowledge of the lie. Laws generally, and the MRPC in particular, place importance on "knowledge" and "intent" in creating culpability. We would like to examine this concept more closely in the exercises below.

Exercise 5.2

1. What does the "knowledge" component of MPRC Rule 3.3 entail? Is this knowledge standard strict enough? In other words, are there ways to fall short of candor that are not forbidden in these rules?

2. Do you believe that there is enough oversight of legal practice? Why? If you do not, what else do you think should be done? Or, do you think there is too much oversight? How could it be improved?

3. Looking ahead to the next section: Does "zealous advocacy" mean we should argue by any means necessary in order to win? Why or why not? If there is an ethical "line," where do you draw it? What sorts of arguments should be off-limits?

§5.4. *Abuse of Emotional Appeals*

Ancient teachers of rhetoric recognized that rhetoric was a powerful tool that needed to be treated with care. They asked, How can we use this powerful tool—rhetoric—in an ethical way? Where is the line between **persuading** and **misleading**?

Earlier in this handbook, we presented the three rhetorical "proofs" (See Chapter 1, §2). We will review them here, and concentrate on the proof of *pathos*, that is, appeals to the audience's emotions or beliefs.

The three emotional appeals are simply categories of the types of arguments that rhetors use to persuade an audience. *Ethos* is the appeal based on the credibility of the speaker; *logos* is based on the logical arguments the speaker makes; *pathos* describes arguments that appeal to the emotions of the audience.

Appeals to emotions include the following:

- use of pejorative or honorific language—praise or insults
- appeals to commonly held values
- appeals to a shared sense of justice, fairness, "rightness"
- use of a vivid description of an event, person, or place

Pathos appeals are a valid part of any writers' tool set. However, lawyers and politicians are sometimes accused of using emotional appeals to twist the facts, or to persuade an audience to grant them greater power. This type of persuasion is an abuse of *pathos*.

To take one example, writers often abuse emotional appeals that evoke the audience's fear of something bad happening in the future. In rhetorical terms, this type of appeal is called an ominatio. The English word "ominous" is similar in spelling and in meaning:

> After the attack on the World Trade Center and the Pentagon in 2001, the Bush Administration appealed to our collective fear of attacks—our terror—and increased the federal government's powers in many areas. The federal government, especially the

> executive branch, obtained great financial, military, surveillance powers.

For some, this appeal to terror was fully justified, but others felt that the terror appeal crossed the line by overemphasizing terror threats and limiting rational discussion. Clearly, the question of when pathos appeals are misleading depends on the audience and context, as in any rhetorical situation.

How do you know if you are crossing the line? There are no hard and fast rules for determining when pathos is inappropriate. Instead, courts decide on a case-by-case basis, based on Rule 403, which may exclude emotional appeals from trial based on the evidentiary rule of prejudice.

"Prejudice" is codified in the Federal Rules of Evidence at Rule 403:

> **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Here, our courts have recognized the risks inherent in appeals to *pathos*. Often, when Rule 403 is invoked at trial, the evidence a lawyer seeks to exclude has a strong emotional component.

Rule 403 objections often claim that the evidence submitted will trick the factfinder into making a decision that goes against the weight of the facts. Rhetorically speaking, this means that the court favors *logos* over *pathos*. A judge will exclude evidence under Rule 403 if there is a risk that emotions will overwhelm logic.

The Supreme Court explains this in *Old Chief v. United States* (1997):

> The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the

> offense charged.[41]

The Advisory Committee Notes to Rule 403 explain, "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[42]

In practice, lawyers often make all available arguments and wait for the opposition to object. However, teachers of ancient rhetoric often pointed to Aristotle's key insight that people should seek moderation, or the "Golden Mean," if they are to exercise virtue. From the perspective of audiences, Aristotle wrote that

> [I]t is possible to feel fear, confidence, desire, anger, pity, and generally to be affected pleasantly and painfully, either too much or too little, in either case wrongly; but to be thus affected at the right times, and on the right occasions, and towards the right persons, and with the right object, and in the right fashion, is the mean course and the best course, and these are characteristics of virtue.[43]

Aristotle knew that too much emotion was just as harmful for the argument as too little. As a rhetor, you should strive to evoke this "Golden Mean" with your words, charting a **middle course** between too much and too little emotion. In practical terms, you might try to re-word a sentence or paragraph in the **most emotional** and then the **least emotional** terms possible. Then, you might try to write the "Golden Mean" version—the sentence that **best balances** emotion or strikes the right level of pathos appeal for the occasion.

---

41 Old Chief v. United States, 519 U.S. 172, 180 (1997).

42 Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C. App., p. 860 (*citing* Old Chief v. United States, 519 U.S. 172 (1997))

43 ARISTOTLE, NICHOMACHEAN ETHICS, Book II, Chap. 2, § 6-7.

Exercise 5.3

You are prosecuting a man charged with murder and mugging of a US soldier recently returned from war. How would you describe the event in 1-2 sentences? Try out these three versions:

1. Write the **most emotionally charged** sentences possible.

2. Write the **least emotionally charged** sentences possible.

3. Now write a **moderately emotional version**, the "Golden Mean" version.

§ 5.5. Rhetorical Fallacies

Rhetorical fallacies are flawed arguments. Fallacies rely on false premises, or false relationships between premises. (A premise is a fact or supposition that an argument is based upon.) Here are some examples.

> Argument: You shouldn't vote for Barack Obama, because he doesn't own a gun.
>
> False Premise: Only gun owners make good presidents.
>
> False Premise: If the president isn't a gun owner, he will infringe on your Second Amendment rights, or mishandle the military, or be a general weakling.

You are probably aware of many fallacies already: red herring, *ad hominem*, slippery slope, straw man—many of these arise in law school discussions. Your professors might have pointed these fallacies in court opinions, or in critiques of arguments in trial practice courses.

So what's the ethical problem with using fallacies? Is the use of a bad argument also morally "bad"?

There are two ethical problems with using rhetorical fallacies.

First, fallacies are misleading. Rhetorical fallacies disguise poor arguments in the clothing of persuasion, logic, and smooth language. A judge might not be fooled by your tricky language, but jurors and clients might. You are in a position of trust and authority; you violate this trust if you use fallacious arguments to mislead laypersons.

Second, the use of rhetorical fallacies probably means you have failed in your duty to zealously advocate for your client. Poor arguments are often a sign of poor preparation.

We have presented five rhetorical fallacies below, with examples from legal cases.

§ 5.5.1. Non Sequitur

Definition: A *non sequitur* occurs when a conclusion is based on a false premise. The example above about Barack Obama and gun

ownership is one example. This type of argument occurs often in law.

Example: In *U.S. v. Huckins*, the defendant was convicted of possessing child pornography, but was sentenced to a prison term 5 years shorter than the minimum required by the sentencing guidelines. The prosecution appealed this sentence. The 10th Circuit, upon reviewing the case, found that "The court discussed that it was troubled by this case because Mr. Huckins did not fit the characteristics of the typical defendant who possesses child pornography." 529 F.3d 1312, 1316 (10th Cir. 2008).

The court's argument can be restated as follows: Because the defendant does not resemble a "typical" child porn consumer, he deserves a lesser sentence.

This argument relies on a number of false premises:

(1) There is such a thing as a "typical" child porn consumer.

(2) Failure to resemble the typical criminal means that this particular criminal is less culpable.

(The Court of Appeals affirmed the sentence.)

§ 5.5.2. Slippery slope

Definition: This is a common argument in law, given credence because our legal system relies on precedent and *stare decisis*. The slippery slope arguments suggests one decision will necessarily lead to another decision, one that usually results in some dire consequence, when there is inadequate evidence that such a chain reaction will occur. This argument suggests that if we take even one step onto the "slippery slope," we will end up sliding all the way to the bottom. The presumption is that, because of moral or legal reasons, we will not be able stop halfway down the hill.

Example: In his dissent to *Lawrence v. Texas* (2003), Justice Thomas argues that if the Court decriminalizes sodomy, "what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution?'" 539 U. S. 558, 605 (2003) (*internal citations omitted*).

Thomas, and others who support anti-homosexual legislation, fear a dire consequence—the legalization of gay marriage—and insist

that *any* legal protections granted to homosexuals necessitate the granting of *all* legal protections. In actuality, there is no necessary legal correlation between the removal of criminal sanctions for sexual behavior and the substantive due process claim to marriage.

§ 5.5.3. Weak analogy

Definition: Lawyers often argue by analogy. And, admittedly, often these analogies are weak. A weak analogy occurs if the two things being compared are not alike in a *relevant* aspect—the aspect relied upon by the analogy.

It is important to understand that *all* analogies are imperfect in some way--there is never a perfect correlation between analogs. That's why this fallacy is called "weak" analogy, rather than "false" analogy. Some analogies are strong, and some are weak, but none are true or false.

Example: A five-year-old argues that if his 10-year-old sister is allowed to walk to the park by herself, then he should be allowed to as well, because they are both just kids. This analogy ignores the age difference between the two children, which is the *relevant* quality used to determine parental permission to walk to the park.

§ 5.5.4. Ad Hominem

Definition: The *ad hominem* fallacy, a rhetorical defense, attacks the speaker of an argument, rather than refuting the premises of the argument.

Sometimes the poor quality of the speaker's character legitimately casts doubt on the quality of his argument. Lawyers use all sorts of valid—that is, relevant—personal attacks to impeach witnesses at trial, such as evidence of prior criminal convictions or of a personal stake in the outcome of the trial. Prior convictions mean that the testimony is less trustworthy; a personal stake means that the testimony might be false in order to ensure an outcome favorable to the witness. However, lawyers must be careful that the *ad hominem* impeachment of a witness is sufficient to refute the witness's testimony.

The most egregious examples of the *ad hominem* fallacy rely on personal attacks that are irrelevant to the believability or credibility of the argument.

Example: You shouldn't listen to Barack Obama's economic plan because he is black.

Clearly, Obama's race does not impeach his knowledge of economics, nor is race indicative of poor character.

§ 5.5.5. Appeal to Pity

Definition: The appeal to pity works to make the audience feel sorry for the object of the discussion. The problem with this appeal is that often the pitiful aspects of the object of discussion are allowed to override the more relevant aspects. (This is similar to the emotional appeals sometimes excluded under Rule 403.)

Example: In the *Huckins* case, the defendant was convicted of possession of child pornography, then presented mitigating evidence at sentencing in order to decrease the length of his prison term. The defendant's argument relies in part on an appeal to pity (emphasized in bold):

"Mr. Huckins argued that, among other things, **he was 20 years old at the time** of the crime and 22 at the time of sentencing, he had virtually no criminal record, had been employed, cooperated with law enforcement and consented to the search, was not indicted until a year and a half after the FBI seized his computer, he pleaded guilty, immediately sought psychotherapy once charged, and made efforts to correct his life, such as becoming involved in relationships and stopping excessive drinking. He also noted that, **as a result of pleading guilty, he will be a registered sex offender for the remainder of his life**. 529 F.3d at 1315."

In this argument, Huckins sought the pity of the sentencing judge based on (1) the folly of youth, and (2) the harshness of being registered in the sex offender database. As a result of this appeal to pity (among other appeals), the federal judge disregarded the sentencing guidelines, which stipulated a sentence of 78 to 97 months, and instead sentenced the defendant to 18 months in prison. The court does not explain why being 20 years old should mitigate this particular crime, nor why the registration in the database should lead to a lessening of the prison term.

Exercise 5.4

For each of the examples listed here, determine whether or not it counts as a logical fallacy and, if so, which one:

1. A prosecutor asks the judge to not admit the eye-witness testimony of a homosexual because homosexuals are not trustworthy.
2. A lawyer argues that we should not raise the speed limit on highways to 90 mph because doing so would cause the number of accidental deaths to skyrocket.
3. A lawyer pleads that his client should be found not guilty for stealing from his employer because his client is poor, lives in a ramshackle house, and has eight children to feed.
4. A defense lawyer in an anti-trust case argues that every cable provider is perfectly free to set a price for its own products, so there is nothing wrong with a group of cable providers getting together to set prices to deliver television service to their consumers.
5. A psychiatrist argues in court that the main criteria for someone to be diagnosed with clinical depression is having experienced a major depressive episode lasting at least two weeks. Since the defendant in this case experienced four weeks of depression, she has clinical depression.
6. A judge argues that schools should be desegregated by economic class because it would improve the lot of poor children, who currently attend poorly funded schools where they read out-of-date books, sit in run-down, broken desks, and have few role models to inspire them to work towards a better future.
7. A judge rules that Physician-Assisted Suicide should not be legal because the practice would be extended beyond patients who have met strict requirements and signed legal agreements, leading to some patients dying without having requested euthanasia.
8. A psychiatrist argues in a murder case that if someone is a psychopath, he or she will act erratically. Since the defendant was acting erratically, he is a psychopath.

Answer Set 5.4

1. Fallacy – *Ad Hominem*. Homosexuality is an irrelevant characteristic in determining trustworthiness.

2. Not a fallacy – This claim can be supported with studies of highway deaths.

3. Fallacy – Appeal to Pity. The impoverished status of the defendant's family has no bearing on whether the defendant committed all of the elements of the crime.

4. Fallacy – Weak Analogy. Just because it is okay for a manufacturer to set a price does not mean it is okay for a group of manufacturers to price-fix.

5. Not a fallacy – The doctor presented medical standards and the evidence met those standards.

6. Not a fallacy – Unlike example 3., the poverty of the students' education is directly relevant to the judge's decision.

7. Fallacy – Slippery Slope. There is no evidence to support the claim that the practice would be extended.

8. Fallacy – *Non Sequitur*. The conclusion (psychopath) does not necessarily follow from the evidence (erratic behavior).

Better Writing, One Case at a

ever find yourself staring at a blank computer screen, wonder
e words just aren't coming? Are you frustrated with handbooks
o focus on the knitty gritty "rules" of grammar or usage, withou
g the big picture?

gal Writing Workshop: Better Writing, One Case at a Time will
ategies to address any writing task from start to finish. Our goa
wyers develop a thorough system for writing and speaking, on
ses a full spectrum of writing concerns, from beating writer's b
ainstorming strategies, to developing eloquent writing style, to
ically for any given case. As professors of rhetoric and compos
a unique combination of ancient techniques and cutting edge
on rhetoric, writing, and composition to give you the tools to w
y.

ghts:

ve Ways to Jump Start Your Legal Writing
ne "ACE" Approach to Style
ne Seven Common Legal Topics
lus, checklists, exercises, and self-editing tips

Dr. Pryal, Lecturer at the UNC Department of E
and the UNC School of Law, specializes in legal
ing and argumentation.

Dr. Jack, Associate Professor of Rhetoric at the
versity of North Carolina, Chapel Hill, specialize
scientific, technical, and professional writing